Quarterly Report
of the
ATTORNEY GENERAL
of
ALABAMA

For The Period
From July 1, 1953
Through September 30, 1953

VOLUME 72

SI GARRETT, Attorney General

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QUARTERLY REPORT

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Volume No. 72

TO THE STATE, COUNTY, AND MUNICIPAL OFFICERS OF ALABAMA:

This Quarterly Report of the Attorney General of Alabama, which includes all official opinions rendered by the Attorney General from July 1, 1953, through September 30, 1953, as published in compliance with the provisions of Title 55, Section 228, Code of Alabama, 1940.

Under this section of the Code, I am required to send seven copies of this Quarterly Report to each judge of probate in the State and the judge of probate, in turn, is required to deliver one copy each to the clerk of the circuit court, the sheriff, the tax collector, the tax assessor, the county superintendent of education, and the deputy or county solicitor of his county. This section also requires that I send a copy of this report to each circuit solicitor and the chief executive officer of each incorporated municipality in the State.

The office of the Attorney General is anxious to render prompt and efficient service to the State, county, and municipal officials. If you have any suggestions to make regarding the improvement of the service, I shall be glad to hear from you.

Sincerely,

SI GARRETT,

Attorney General.

OPINIONS

July 13, 1953

Hon. Tom C. Carner
Judge of Probate
Jefferson County
Birmingham, Alabama

Hon. Holt A. McDowell
Sheriff, Jefferson County
Birmingham, Alabama

Hon. Julian Swift
Circuit Clerk
Tenth Judicial Circuit
Birmingham, Alabama

Elections—Jefferson County—Municipalities.

1. Candidates for the office of president of the commission and commissioner for the City of Birmingham must comply with the provisions of Title 62, Section 623, Code of Alabama 1940, regardless of their having been nominated by a party primary.

2. In preparing municipal election ballots, the election commission of the City of Birmingham must list the name of the office followed by an alphabetical list of candidates in compliance with Title 62, Section 623, Code of Alabama 1940.

3. Upon receiving a proper certificate of nomination in a party primary the election commission of the City of Birmingham may cause to be placed opposite the name of a candidate a designation of the party which he represents either by word or emblem.

Opinion by Assistant Attorney General Sykes.

Dear Sirs:

Your request for an official opinion bearing date of June 24, 1953, is as follows:

"Section 709 Title 62 of 1940 Code states that the Probate Judge, Sheriff and Circuit Clerk of the County shall constitute an election commission for the City of Birmingham. Section 621 through 627 Title 62 of 1940 Code of Alabama has to do with election of City Commissioners of Birmingham. Section 623 Title 62 says how a person may become a candidate for such Commission and how the names of Candidates shall be arranged upon the ballot.

"Democratic and Republican primaries were held in the City of Birmingham with candidates nominated by each party to run in October and in addition to that one person has qualified under Section 623 for City Commission who did not run in either primary.

"We will greatly appreciate your opinion as to whether or not all persons must qualify under Section 623 Title 62 of 1940 Code in order to run for City Commissioner of Birmingham, in October, notwithstanding the party nominations by primary elections, and further how the names of candidates must be placed on the ballot. That is to say must the names appear in alphabetical order for each position regardless of party or should they appear as Democrat, Republican, etc.

"We are very much interested in settling this question as early as possible and will appreciate an opinion at your earliest convenience."

In my opinion, all candidates who participate in the municipal election in October must qualify under the provisions of Title 62, Section 623, Code of Alabama 1940.

It is further my opinion that the names of candidates should appear in alphabetical order beneath the title of the office for which they are running.

It is also my opinion that those candidates who have been nominated by a party primary may have indicated opposite their names of the party or its emblem for purposes of identification.

Title 62, Section 623, Code of Alabama 1940, provides as follows:

" § 623. Statement of candidacy.—Any person desiring to become a candidate at any election for the office of president of the commission or commissioner may become such candidate by filing in the office of the judge of probate of the county in which such city is situated, a statement in writing of such candidacy, accompanied by an affidavit taken and certified by such judge of probate or by a notary public that such person is duly qualified to hold the office for which he desires to be a candidate. Such statement shall be filed at least twenty-one days before the day set for such election and shall be in substantially the following form: 'State of Alabama, _____ County. I, the undersigned, being first duly sworn, depose and say that I am a citizen of the City of _____, in the State and County, and reside at _____ in said city _____, that I desire to become a candidate for the office of _____ in said city at the election for said officer to be held on the _____ day of October next and I am duly qualified to hold said office if elected thereto, and I hereby request that my name be printed upon the official ballot at said election. Signed _____; Subscribed and sworn to before me by said _____ on this _____ day of _____, 19____, and filed in this office for record on said day. _____, Judge of Probate.' Said statement shall be accompanied by a petition signed by at least two hundred persons who shall be qualified to vote at said election, request-

ing that such person become a candidate for said office at said election. The signers to said petition shall set forth their names in full and their residence addresses, and said petition shall be in substantially the following form: 'We, the undersigned duly qualified electors of the City of _____, and residing at the places set opposite our respective names, do hereby request that the name of _____ _____ be placed upon the official ballot as a candidate for the office of _____ in said city, at the election to be held in this city on the _____ day of October next. We further state that we know said _____ to possess the qualifications necessary for said office, and to be in our judgment a fit and proper person to hold said office. Witness our hands on this the _____ day of _____, 19____.' At every such election all ballots to be used by voters shall be printed and prepared by the election commission and at the expense of said city, and shall contain the names of all candidates placed in alphabetical order directly underneath the words 'For President of the Commission' and 'For Commissioner,' as the case may be. **No name shall appear upon said ballot as a candidate for election except the names of such persons as have become candidates according to provisions as above set forth;** no ballot shall be used at any such election except the official ballot prepared by the election commission." (Emphasis supplied)

It is to be noted that the above quoted statute makes no provision whatsoever for a party primary to nominate candidates who desire to run for president of the commission or commissioner. However, Title 62, Section 644, Code of Alabama 1940, provides that all general laws regulating and prescribing the conduct of municipal elections shall apply, except when those general laws are expressly modified by the local law.

Section 623, supra, requires that candidates for the office of president of the commission and for the offices of commissioner file with the probate judge a declaration of candidacy accompanied by an affidavit that such candidate is duly qualified to hold the office which he seeks. In addition thereto, a petition signed by at least two hundred persons who are qualified electors must be presented to the probate judge. Such petition should request that the person seeking office become a candidate in the October election. Section 623, supra, further provides that "no name shall appear upon said ballot as a candidate for election except the names of such persons as have become candidates according to the provisions as above set forth." Regardless of the nomination by party primary, it is my opinion that candidates must comply with Section 623, supra, for the reason that said Section expressly states that all candidates shall comply. In my opinion, this means that the declaration of candidacy, the affidavit of qualification, and the petition containing two hundred names must be presented to the judge of probate, as this is the only method prescribed for becoming a candidate. It will be necessary, therefore, for those persons who have received party nomination in a party primary to comply with the provisions of Section 623, supra.

It is further my opinion that the ballot to be used in the October election should comply with Section 623, supra; that is to say, that the name of the office should be followed by an alphabetical list of the candidates seeking said office. For example, the ballot should contain the following:

"For President of the Commission:

Vote for One

John Able
Richard Brown
Henry Carter
Jack Doe."

The form of such ballots is particularly described by Section 623, supra, and should be complied with.

It is stated in your inquiry that both Democrats and Republicans have held primary elections for the purpose of nominating candidates for the October election. I have already pointed out that Section 644, supra, provides that the general election laws are applicable to municipal election in Birmingham when those laws are not in conflict with the local laws. Section 644, supra, of course, refers to Title 37, Sections 26-34, Code of Alabama 1940. See also, Title 37, Section 41, Code of Alabama 1940. I am also of the opinion that the election laws contained in Title 17, Code of Alabama 1940, govern municipal elections when the sections in said title are applicable and not in conflict with specific legislation. See Title 17, Section 1, Code of Alabama 1940.

The general election laws provide that the names of candidates nominated at a party primary be placed upon the ballots. Title 17, Section 145, Code of Alabama 1940, as amended by Act No. 79, General Acts 1945, page 76. Party candidates are placed upon the ballot by having their names certified in writing by the party, together with the office for which said person is nominated. Such certificate should be signed by the "chairman and secretary of the convassing board of such primary election." In my opinion the election commission may receive certificates of nomination in respect to each candidate nominated in a party primary and may cause to be printed on the ballot opposite the name of such candidate a proper identification of the party by which he was nominated. This identification may consist of the party emblem or the printed name of the party. For such identification to appear opposite the name of said candidate, is, in my opinion, not improper.

The election commission should, therefore, prepare a ballot in the following form:

"For President of the Commission:

Vote for One

John Able (Democrat)
(Or the Party Emblem)

Richard Brown (Republican)
(Or the Party Emblem)

Henry Carter (Independent)
(Or the Party Emblem)

Jack Doe (Independent) (Or the Party Emblem)"

I should add that the commission should adopt one form or the other in identifying party candidates. The printed word, "Democrat" or "Republican" should be used, or the emblem should be used, or both, in respect to each candidate. The identification should be uniform.

In adopting this form of ballot for the municipal election in Birmingham, it is my opinion that said ballot will comply with Section 623, supra. I have not suggested a ballot in the form of that used in general elections (Title 17, Sections 154, 155, Code of Alabama 1940), for the reason that it would be impossible to list the candidates for the respective offices in alphabetical order under the name of the office.

In conclusion, therefore, you are advised. (1) that all candidates for president of the commission and for commissioner in the municipal election to be held in Birmingham in October must comply with Section 623, supra; (2) that the names of candidates must appear beneath the name of the office in alphabetical order; and (3) that upon receiving a certificate of nomination from party authorities, a candidate may have placed opposite his name an indication either by word or emblem of the party which he represents.

I am enclosing a copy of a letter of this office under date of June 11, 1952, addressed to Hon. E. K. Hanby, Jr., County Attorney, Etowah County, Alabama, wherein we advised that a party primary may be held in a municipal election. The contents of this letter may be helpful to you.

Very truly yours,

SI GARRETT
Attorney General

July 22, 1953

Hon. H. A. Longshore,
Superintendent of Insurance,
Department of Insurance,
CAPITOL.

Insurance—Traveling Expenses.

Under Act No. 234, General and Local Acts 1951, page 504, a

domestic insurance company pays a reasonable per diem, subsistence, and travel allowance for the examiner designated by the superintendent of insurance to examine the affairs of such company, whether the examiner is a full-time employee of the State or not.

Opinion by Assistant Attorney General Madison.

Dear Sir:

Your request for an official opinion, bearing date of May 11, 1953, is as follows:

"The Department of Insurance recently made an examination of a domestic life insurance company as required by Section 2 of the act approved September 21, 1939, appearing in Alabama Code 1940 as Title 28, Section 50. I will appreciate your opinion in answer to the following questions:

"1. Is the company examined chargeable with the expense of examination?

"2. If not all, what expenses are chargeable to the company examined?

"3. Does subsection 13 of Section 9 of the act approved July 16, 1951 appearing in Alabama Code 1940 as Title 28, Section 47 (9) (13) give the Superintendent of Insurance authority to charge the expenses of examination including reasonable per diem, subsistence and travel allowance for such examiners, to the company examined?"

Domestic insurance companies are examined at least once in every three years by the superintendent of insurance, or such examiners or accountants as he may appoint, under the provisions of Section 50, Title 28, Code of Alabama 1940, relating to the Bureau of Insurance.

Under Section 52 of Title 28, Code of Alabama 1940, the insurance company pays the actual railroad fare or other traveling expenses actually incurred, and in addition the hotel bills and other actual expenses of the person making such examination not to exceed the maximum of $3.00 per day per person for such expenses. It thus appears that the insurance company does not pay the per diem or other compensation of the examiner and only pays $3.00 per day for hotel bills and other actual expenses which would include meals.

By Act No. 234, General and Local Acts 1951, page 504, the Department of Insurance was created, with the Bureau of Insurance as a division thereof.

Under Section 9 of said Act No. 234, supra, the superintendent of insurance has the power to examine or cause to be examined all domestic

and foreign insurance companies. He also has the authority to "set a reasonable per diem, subsistence and travel allowance for such examiners or other persons designated by the superintendent of insurance for such purpose," and "all insurance companies . . . examined under this section shall pay all expenses incurred in such examination."

The said Act No. 234, supra, provides for the repeal of all laws in conflict therewith.

There is at least this difference between Section 52, supra, and Act No. 234, supra: The latter provides for a per diem for the examiner to be paid by the insurance company, while the former did not, and a reasonable subsistence allowance is provided instead of $3.00 per day for hotel bills and other actual expenses of the examiner.

It is my opinion, therefore, that Act No. 234, supra, governs, and a domestic insurance company now pays all the reasonable expenses of the examiner designated by the superintendent of insurance, which includes a per diem for the examiner, whoever he may be, and whether he is a full-time employee of the State or not.

Since this results in an affirmative answer to your first and third questions, it is not necessary to answer the second question.

Yours very truly,

SI GARRETT

Attorney General

August 4, 1953

Hon. J. P. Shaffer, Clerk

Board of Revenue

Montgomery County

Montgomery, Alabama

Attorneys—Montgomery County.

An attorney retained by resolution of Board of Revenue of Montgomery County is not an employee of the County within the provisions of Act No. 240, Local Acts 1947, page 165.

Opinion by Assistant Attorney General Straub.

Dear Sir:

Your request for an official opinion bearing date of May 14, 1953, is as follows:

"The Board of Revenue has asked that I request of you an opinion on the following question:

"The Board has under the general statutes of Alabama in Title 13, Section 229, subsection 8 retained by resolution on its minutes, an attorney to advise it on matters from time to time. Such attorney is not the County's attorney under any local statute relative to Montgomery County. The Clerk, The County Engineer and the County Physician all operate under specific local statutes.

"Our attorney does not believe he is under the County's pension law and the question we would like for you to decide is whether or not our attorney retained as above outlined is a County Employee to the extent as bringing him within the meaning of the Montgomery County pension law, which said law was approved July 29, 1947, a copy of which is attached hereto for your information.

"Your opinion will in no way effect the status of the County Engineer, the County Physician, and the Clerk of the Board of Revenue as they are all under specific local statutes. Your answer of this will be appreciated."

Under the provisions of Title 13, Section 229, subsection 8, Code of Alabama 1940, Montgomery County is authorized to retain an attorney. Quarterly Report of Attorney General, Vol. 51, page 227.

An agreement under Section 229, supra, is construed to be in the nature of a general retainer, rather than a contract for annual employment. Quarterly Report of Attorney General, Vol. 65, page 30.

Act No. 240, Local Acts 1947, page 165, provides a pension system for "employees" of Montgomery County. It is my opinion that an attorney retained by the Board of Revenue of Montgomery County, under the provisions of Section 229, sub-section 8, supra, is not an employee within the provisions of Act No. 240, supra.

Yours very truly,

SI GARRETT

Attorney General

August 4, 1953

Hon. Roy D. Gist,
Chairman, Board of Revenue,
Jackson County,
Scottsboro, Alabama.

Counties—Jackson County—Roads and Bridges—Highways and Highway Department.

1. It is not mandatory on the part of Jackson County to levy a tax under Section 215 of the Constitution of Alabama 1901 to pay general obligation bonds of the county where other funds may be available for said purpose.

2. Under Act No. 140, General and Local Acts 1951, page 371, applying to Jackson County only, all funds for road and bridge purposes only must be paid over to the State Highway Department.

3. Under Act No. 140, supra, the State Highway Department is not entitled to any portion of the funds arising from a tax levy made by Jackson County under Section 215, supra, for roads, bridges, and public buildings until the county governing body has first designated the part thereof to be used for roads and bridges only.

4. Under the general law and Act No. 140, supra, the surplus of the tax in the one mill Jackson County Bond Fund, levied under Section 215, supra, for the purpose of paying the principal and interest on bonds for road and bridge purposes, may be paid over to the State Highway Department for the construction of roads and bridges in Jackson County.

5. Jackson County should keep the official books and records on the receipt and disbursement of the one mill tax levied under Section 215, supra, by Jackson County for the payment of the principal and interest on its general obligation bonds, and the State Highway Department should keep the bond and warrant register of the county until the said bonds are paid.

Opinion by Assistant Attorney General Madison.

Dear Sir:

Your request for an official opinion bearing date of June 30, 1953, is as follows:

"On June 9th, 1953 you rendered an opinion to Hon. W. G. Pruett, Di-

rector, State Highway Department in regard to the Jackson County 1½ mill Bond Fund and the 1 mill Road and Bridge Fund, levied under authority of Section 215 of the Constitution of 1901. We would like to have your opinion on the following questions:

"1—Under provision of Act No. 140, S 336 Regular session 1951, Section 6 provides that the State Highway Department pay all the outstanding financial obligations of Jackson County incurred by the County for roads and bridges prior to June 29, 1951.

"Will it be mandatory for the county governing body of Jackson county to levy any tax under authority of Section 215 of the Constitution of 1901 for the payment of principal and interest on bonds issued by the county for roads and bridges prior to June 29th, 1951?

"2—On August 14th, 1951 there was transferred to the State Highway Department from Jackson County the sums of $18,470.26 from the 1½ mill Bond Fund, and $22,928.69 from the 1 mill Road and Bridge Fund levied under authority of Section 215 Constitution of 1901, for payment of the principal and interest due on the refunding bonds issued for public roads and bridges and public buildings in Jackson County. This total sum of $41,398.85 was transferred without the authority, designation, approval or appropriation of the governing body of Jackson County. Since the State Highway Department has received approximately $11,000.00 more than they have paid on the principal and interest due on the refunding bonds issued for roads and bridges from the 2½ mill tax levied under authority of Section 215 Constitution 1901, would it be mandatory for the State Highway Department to refund to Jackson County the amount of any over payment?

"3—There is now a surplus of $38,040.76 in a 1 mill Jackson County Bond Fund levied under authority of Section 215 Constitution of 1901 for the purpose of payment of the principal and interest on the refunding bonds issued for road and bridge purposes. Would it be legal for the governing body of Jackson County to appropriate by designation all or a part of this fund to the State Highway Department for the construction of roads and bridges in Jackson County?

"4—Since August 14th, 1951, the Jackson County Board of Revenue has not kept any official books or records on the 1 mill Bond Fund levied under Section 215 Constitution 1901. Who should keep the official records of the receipts and disbursements and issue and sign the warrants against this fund?

"5—The State Highway Department has the official Bond and Warrant Register of Jackson County in its possession, and if it is mandatory for Jackson County to pay the principal and interest on the outstanding bonds issued by Jackson County prior to June 29th, 1951, would it be

mandatory for the State Highway Department to surrender to Jackson County Board of Revenue the Bond Register together with the paid canceled bonds and interest coupons?"

It appears from the opinion to Hon. W. G. Pruett, referred to in your request, that the bonds issued for road and bridge purposes are general obligation bonds of Jackson County, carrying therein the following pledge as to each bond: "For the prompt payment of this bond, both principal and interest, as the same becomes due, and for the levying of taxes sufficient therefor, the full faith, credit and resources of said County are hereby irrevocably pledged."

It will be noted that the bonds do not specifically carry a pledge of the proceeds of the two and one-half mill tax, or any portion thereof, which may be levied under Section 215 of the Constitution of Alabama 1901. In the absence of such a pledge, the following statement from the case of **Jefferson County v. City of Birmingham**, 251 Ala. 634, 38 So. 2d 844, is here applicable:

" . . . . For it must be remembered that it is not obligatory to raise any funds under section 215, and it is not contemplated that it be done except to supply a need not otherwise provided for. To the extent that the legislature has so provided, it will be a perversion of section 215 to raise funds under it. For the proviso by no means sets up the only method which may be adopted to pay debts and liabilities for building and maintaining roads, as we stated in the instant opinion. If this may be done by the use of funds derived from the five mill tax provided for general purposes, or from any other source, it would not be a proper interpretation of section 215 to hold that it could not be done in that way, and that the special tax under the said proviso must be the only source from which funds to do so may be obtained. . . ."

It will be seen, therefore, that a tax under Section 215, supra, is not the only source of revenue which may be available for the payment of said general obligation bonds.

Under Act No. 140, General and Local Acts 1951, page 371, it is the duty of the State Highway Department to pay the principal and interest on said bonds as they become due. The obligation to pay, however, is still upon Jackson County; it is still a debt of Jackson County.

Under Section 2(a) of Act No. 140, supra, Jackson County has the power "to levy road and bridge taxes and to appropriate money for the construction, maintenance and repair of county roads and bridges in the same manner and to the same extent as it may presently do so under the laws of the State."

While Jackson County has the authority to levy a tax under Section 215, supra, just as it had before the passage of Act No. 140, supra, it is not

mandatory that it do so to provide funds for the payment of the principal and interest on said general obligation bonds. As pointed out above, other funds may be available for said purpose.

Your first question is, therefore, answered in the negative.

It is my understanding from my telephone conversation with you under date of July 8, 1953, that after said bonds were issued Jackson County levied, under Section 215, supra, a tax of one and one-half mills for road and bridge purposes only; that the proceeds from this tax were pledged to the payment of the principal and interest on said bonds. It also levied an additional one mill tax for roads, bridges, and buildings, the proceeds of this tax not being pledged to the payment of said bonds; that the $18,470.26 mentioned in your request arises from the one and one-half mill levy; and the $22,928.69 arises from the one mill levy. It is my further understanding that the surplus of $38,040.76 comes from a one mill levy under Section 215, supra, which supplants the previous one and one-half mill levy, and is for road and bridge purposes only, but pledged to the payment of the principal and interest on said bonds.

Under Section 4 of Act No. 140, supra, it is provided that upon the effective date of said Act "the governing body of Jackson County and all officials of the county shall transfer and turn over to the State Highway Department all funds, supplies, equipment, machinery and materials held, owned, leased or controlled by it or them for the construction, maintenance, and repair of county roads and bridges." Since the $18,470.26 is pledged and devoted to the payment of the principal and interest on bonds issued for roads and bridges only, it is my opinion that the State Highway Department is entitled to have and receive all of this amount. **Hall v. Underwood,** _____ Ala. _____, 63 So. 2d 683.

The $22,928.69 arises, however, from the one mill levy for roads, bridges, and public buildings and is not pledged for the payment of the principal and interest on said bonds. This amount was transferred to the State Highway Department without the approval or authority of the governing body of Jackson County and without any designation having been made as to what portion of said funds should be used for roads and bridges only.

In the case of **Hall v. Underwood,** supra, it was held that the Highway Department was not entitled to the proceeds of a tax levied under Section 215, supra, for roads, bridges, and **public buildings** until the county governing body had designated that part of the tax proceeds to be used for roads and bridges **only.**

It is my opinion, therefore, that the governing body of Jackson County should designate the portion or part of the said $22,928.69 to be used for roads and bridges only, and the balance should be returned by the Highway Department to Jackson County for public building purposes.

It is my opinion, in answer to your third question, that Jackson County can appropriate by designation all of the surplus of $38,040.76 in the one mill bond fund to the State Highway Department for the construction of roads and bridges in Jackson County. **Board of Revenue of Shelby County v. Farson, Son and Co.**, 197 Ala. 703, 72 So. 613; Quarterly Report of Attorney General, Volume 28, page 150; Volume 49, page 104.

It is my opinion, in answer to your fourth question, that Jackson County should keep the official records of the receipts and disbursements from the proceeds of the one mill tax levy under Section 215, supra. As pointed out above, however, the only disbursement to be made from this fund is to the State Highway Department, and it then pays the principal and interest on the bonds as they mature. Act No. 140, supra.

In answer to your fifth question, it is my opinion that since the State Highway Department is charged with the duty of paying the principal and interest on the said bonds under Act No. 140, supra, it should retain the bond and warrant register until the bonds have been paid in full.

Yours very truly,

SI GARRETT

Attorney General

August 6, 1953

Hon. Lewey Stephens, Jr.

Circuit Solicitor

Twelfth Judicial Circuit

Elba, Alabama

Schools—Municipalities—Counties.

Where the proceeds of the 3-mill county-wide special school tax and the 3-mill district tax have been pledged to the payment of outstanding bonds, tax revenue accruing from within the corporate limits of a town or city having a newly-established city board of education is not relieved from its proportionate liability for such bonded indebtedness.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion, bearing date of May 21, 1953, is as follows:

"Reference our telephone conversation of this date, I give you the fol-

lowing facts and questions:

"Prior to this time the Coffee County School Board has operated all schools in the county with the exception of the grammar schools of the city of Enterprise. Now, the cities of Enterprise and Elba have passed resolutions in their respective councils to the effect that the two cities will take over the schools and operate them by a city board of education.

"The County Board, prior to the cities resolutions, had floated bonds and pledged to the payment thereof the three mill countywide TAX. The bond issues, dates, and outstanding indebtedness is as follows:

"Year issued	Year mature	Outstanding indebtedness
1938	1959	$ 55,000.00 plus interest
1948	1963	22,000.00 plus interest
1953	1963	150,000.00 plus interest

"The two cities, Enterprise and Elba, having left the County system, will decrease the monies received by the County Board by about 40%. The County Board cannot meet these obligations with the decreased revenue. The question here is:

"DO THE CITY SCHOOL BOARDS HAVE TO CONTRIBUTE THEIR PRO RATA SHARE TOWARD THE PAYMENT OF THIS OBLIGATION SINCE THE COUNTYWIDE THREE MILL TAX WAS PLEDGED THEREON?

"IF SO, WOULD THEIR SHARES BE BASED ON THE NUMBER OF CHILDREN IN EACH SYSTEM?

"Elba is in School District One. The same situation as above applies to the District three mill tax. The issues, dates and outstanding indebtedness of the district tax is as follows:

"Year issued	Year mature	Outstanding indebtedness
1948	1963	$ 16,000.00 plus interest
	1963	53,000.00 plus interest

"We would like to pose the same questions as above to the City of Elba with regards to the District Tax and debt.

"The three Boards propose to meet Friday, next, and if you can answer the questions prior to that time we would certainly appreciate it."

In my opinion, your first question should be answered in the affirmative.

Title 52, Section 273, Code of Alabama 1940, provides that, where a municipality attains a population of 2,500 or more inhabitants, the schools of such municipality may, through an agreement between the city council and the county board of education, remain under the control of the county board of education. In the absence of such an agreement, control of the city schools becomes vested in a city board of education. The statute further provides:

> ". . . . and thereafter the district school tax collected in the city shall be paid over to the custodian of city school funds, and the district school tax collected in the contiguous territory shall be paid over to the custodian of county school funds; provided, that so much of the proceeds of the special school tax collected in the original school tax district as may be required for the retirement of outstanding warrants issued against such tax, including the interest thereon, shall be paid over to the proper official or authority to be used for such purpose."

You state that the proceeds of the county-wide 3-mill school tax have been pledged to secure the said outstanding bonded indebtedness, totaling $227,000.00. Since this source of revenue has been pledged, the proceeds of the tax coming from property within the corporate limits of the city must, like the proceeds of the tax coming from elsewhere in the county, first be used for the annual debt service on the bond issue. That is to say, it is not a question of the city making a voluntary contribution of the proceeds of the tax. The tax having been pledged, the city must pay over its proportionate share of the tax collected within the city. That share would be in such proportion as the total assessed property valuation within the city bears to the total within the county including said city. The number of children in attendance in each school system, city and county, would have no material bearing in calculating the city's pro rata share of the annual debt service load.

In my further opinion, the conclusion reached above applies equally to the city of Elba and the district 3-mill tax. That is to say, the tax revenue, accruing from ad valorem assessments of property within the corporate limits, has heretofore been pledged to secure an outstanding indebtedness totaling $69,000.00. The fact that Elba has established its own city board of education cannot relieve the liability of such revenue for the said outstanding indebtedness, and the city's proportionate share of the tax revenue must annually be applied against the debt load until the indebtedness has been liquidated.

Very truly yours,

SI GARRETT

Attorney General

August 7, 1953

Hon. Theodore Hurt
Clerk and Register
Circuit Court
Perry County
Marion, Alabama

Banks and Banking—Depositories—Registers.

A register of a circuit court who deposits moneys paid to him in his official capacity, but belonging to several different parties, in a single bank account, should take good and sufficient security to secure the payment of the portion of the account which is in excess of $10,000, this being the amount guaranteed by the Federal Deposit Insurance Corporation to each depositor.

Opinion by Assistant Attorney General Sanders.

Dear Sir:

Your request for an official opinion, bearing date of May 18, 1953, is as follows:

"Very often I have on deposit in the Bank here in Marion, Alabama, several thousand dollars more than the amount covered by the Federal Deposit Insurance Act, which sums belong to several different parties.

"On these occasions the Bank deposits certain bonds with the Birmingham Trust National Bank to secure all of my deposits as Register of the Circuit Court of Perry County, Alabama, over and above the amount of ten thousand dollars.

"Please refer to the Federal Deposit and Insurance Act, Sections 330.3 and 330.4 and advise me if I am fully protected under these Sections without having the Bank put up additional security for my protection."

Your inquiry involves your possible civil and criminal liability in case sums of money paid into your office or received by you in your official capacity should be lost because of the failure or insolvency of the bank in which you have deposited said sums. It is my conclusion that the procedure which you have been following is correct, and that you would not be fully protected against possible liability unless you require the bank to put up additional security to secure the payment of funds deposited by you beyond the amount guaranteed by the Federal Deposit Insurance Corporation to each depositor.

I assume that the bank in Marion, Alabama, to which you refer, is a county depository properly designated by the county governing body, as

provided either in Title 12, Section 44, Code of Alabama 1940, or Title 12, Section 4, Code of Alabama 1940, as amended.

Title 14, Section 140, Code of Alabama 1940, dealing with embezzlement by public officers, provides that such officers (among them the register of the circuit court) shall not be criminally liable, under the provisions of the section, for depositing moneys, received by them in their official capacity, in a bank, provided that they take from the bank "good and sufficient security to secure the payment of the funds deposited." This section also provides that if the bank in which the deposit was made has membership in the Federal Deposit Insurance Corporation, or has its deposits guaranteed by such corporation, and the deposit does not exceed the amount guaranteed by such corporation to each depositor, then the officer making the deposit need not require or take from the bank any security to seure the payment of the funds deposited **"so long as the balance on deposit by him** in such bank does not exceed the sum guaranteed by such corporation **to each depositor."** (Emphasis supplied.) Section 140, supra.

Thus, there is a possibility of criminal liability under this section if you should deposit moneys paid into your office in a bank which becomes insolvent, unless the deposits are insured or unless you have taken from the bank "good and sufficient security." The question at hand involves the amount of such deposits.

The Federal Deposit Insurance Act provides that the maximum amount of the insured deposit of any depositor shall be $10,000. Title 12, U. S. C. A., Section 1821(a). You have stated that the total balance of your deposit frequently exceeds this amount and that individual sums which constitute this balance "belong to several different parties." Presumably none of these individual sums exceeds $10,000. Thus, a situation might be presented such that if the individual parties had deposited their sums of money in their individual accounts the full amounts of these deposits would be insured under the federal Act, but because of the fact that a single deposit is made by you in your official capacity a maximum coverage of only $10,000 may be had for all. This would be true, that is, unless the individual owners may somehow trace their ownership and each claim the benefit of the insurance provisions.

The essence of your inquiry, therefore, is whether such individual insurance coverage could be claimed by the individual owners of sums deposited by you, and consequently whether this additional insurance may be taken into account in calculating the amount of "good and sufficient security" which must be demanded by you for the uninsured portion of your deposit, in order to relieve yourself of criminal liability under Section 140, supra. As previously stated, it is my opinion that such security should be required for all money deposited in your official account in excess of $10,000.

The federal Act defines the term "insured deposit" as the net amount due to any depositor for deposits in an insured bank (after deducting offsets) less any part thereof which is in excess of $10,000, and further provides that in determining the amount due to any depositor there shall be added together all deposits in the bank maintained "in the same capacity and the same right for his benefit." Title 12, U. S. C. A., Section 1813(m).

It appears obvious that all moneys deposited by you in an official account as Register of the Circuit Court of Perry County are deposited "in the same capacity"; inasmuch as you have stated, however, that certain sums belong to different parties, it may well be that the entire deposit is not maintained by you in "the same right." See **Federal Deposit Insur. Corp. v. Casady**, 106 F. (2d) 784; **Billings County, N. D. v. Federal Deposit Insur. Corp.**, 71 F. Supp. 696, remanded on other grounds, 168 F. (2d) 452.

You have called my attention, furthermore, to certain regulations issued by the Board of Directors of the Federal Deposit Insurance Corporation, which appear as Sections 330.3 and 330.4 of the Code of Federal Regulations (12 C. F. R., 1952 Cumulative Supplement, Secs. 330.3 and 330.4). The first of these regulations provides:

> "§330.3 **Deposits of Public Officers.** The owner of any portion of a deposit appearing on the records of a closed bank under the name of a public official, State, county, city, or other political subdivision will be recognized for all purposes of claim for insured deposits to the same extent as if his name and interest were disclosed on the records of the bank: **Provided**, That the interest of such owner in the deposit is disclosed on the records maintained by such public official, State, county, city, or other political subdivision and, **Provided further**, That such records have been maintained in good faith and in the regular course of business."

(Section 330.4, referring to specifically designated custodial accounts, does not appear, on the basis of the facts you have given, to be applicable to the present situation.)

Thus it is possible that each of the individual owners of the money deposited by you might be entitled, under the provisions of the federal Act and the regulations promulgated thereunder, to claim the rights of an insured depositor. However, it is the plain intent of our own statute (Section 140, supra) to treat an official who deposits public funds held by him in an official capacity, as being in the same status as an ordinary depositor. That this is true is shown by the wording of the statute: ". . . and the deposit of the officer in such a bank does not exceed the sum guaranteed by such corporation to each depositor, then such officer . . . need not require . . . any security . . . so long as the balance on deposit by him in such bank does not exceed the sum guaranteed by such corporation to each depositor."

The sum guaranteed to each depositor under the federal Act is $10,000. Our statute treats a public officer as any other depositor; it makes no

differentiation for money which he deposits which is owned by others; it refers only to the "deposit" and the "balance on deposit" of the officer. Therefore, if you deposit more than $10,000 in your account, without taking good and sufficient security to secure the payment of the excess portion, it is my opinion that there is a possible liability under Section 140, supra.

This conclusion is not changed by Title 5, Section 157, Code of Alabama 1940, which provides that, notwithstanding any law of the state which requires a bank to furnish security for deposits, such security shall not be required to the extent such deposits are insured under the provisions of Section 12 B of the Federal Reserve Act (which section is now the Federal Deposit Insurance Act). As previously stated, the extent to which deposits are insured under this Act, and its amendments, is $10,000. See Quarterly Report of Attorney General, Vol. 54, page 119.

In view of what has already been said about criminal liability I do not deem it necessary to discuss at length the question of your possible civil liability in the event of a bank failure. The provisos in Section 140, supra, were not designed to protect an officer from civil liability, however, but only from criminal penalties. See Biennial Report of Attorney General, 1930-32, page 654. That potential civil liability might also exist in this instance would seem to be indicated by the case of **National Surety Co. v. State**, 219 Ala. 609, 123 So. 202, and authorities there cited.

Very truly yours,

SI GARRETT

Attorney General

August 7, 1953

Hon. Lee Bidgood

Interim President

University of Alabama

University, Alabama

University of Alabama—Trusts and Trustees.

The Board of Trustees of the University of Alabama may legally invest its Endowment Fund in mortgages which have been accepted for insurance by the Federal Housing Administrator.

Opinion by Assistant Attorney General Madison.

Dear Sir:

The request for an official opinion from your predecessor is as follows:

"Your official opinion is respectfully requested in answer to the following question:

"May the Board of Trustees of the University of Alabama legally invest its Endowment Fund in mortgages which have been accepted for insurance by the Federal Housing Administrator pursuant to Title Two of the National Housing Act by virtue of Title 58, Paragraph 50 of the 1940 Code of Alabama, which reads as follows:

" '50. **Mortgages of Federal Housing Authority.** It shall be lawful for trustees, executors, administrators, guardians and other fiduciaries to invest their funds and the moneys in their custody or possession eligible for investment in mortgages which have been accepted for insurance by the federal housing administrator pursuant to title two of the national housing act.

" 'No law of this state requiring security upon which loans or investments may be made or prescribing the nature, amount or form of such security or prescribing or limiting the period for which loans or investments may be made shall be deemed to apply to loans or investments made pursuant to the foregoing paragraph. (1935, p. 124).'

"See also Acts of Alabama 1915, Page 286, Re: Authorization of The Board of Trustees of the University of Alabama to invest its endowment fund in certain approved real estate securities.

"**Note:** The Endowment Fund of The Board of Trustees of the University of Alabama is a special trust fund made up of income from sale of timber, coal and clay royalties, land rentals under agricultural leases and interest from legal investments out of said fund. It does not include state appropriated funds or student fees."

It is my opinion that the Board of Trustees of the University of Alabama may legally invest its Endowment Fund in mortgages which have been accepted for insurance by the Federal Housing Administrator as provided by law.

Title 58, Section 47, Code of Alabama 1940, as amended by Act No. 763, General and Local Acts 1951, page 1330, provides that a trustee may invest funds in securities or investments which, at the time of the making or purchase thereof, are, among others, "mortgages guaranteed or insured in whole or in part by the Federal Housing Administrator."

The said amendment to Section 47, supra, repealed any statute in conflict therewith.

The **Opinion of the Justices,** 244 Ala. 456, 13 So. 2d 559, is persuasive authority that this view is correct.

Yours very truly,

SI GARRETT

Attorney General

August 7, 1953

Hon. H. S. Brewster
Tax Assessor
Jackson County
Scottsboro, Alabama

Municipalities—Taxation—Assessments—Ad Valorem Taxes.

The failure to notify a tax assessor by June 1, 1953, of a municipal tax levy made in May, 1953, as required by Title 37, Section 700, Code of Alabama 1940, does not prevent the tax assessor from legally making the assessment if he can do so before October 1, 1953.

Opinion by Assistant Attorney General Madison.

Dear Sir:

Your request for an official opinion bearing date of July 29, 1953, is as follows:

"During the month of May, 1953, the City Council of the City of Scottsboro levied a five mill ad valorem tax for the purpose of securing a bond issue. I am the city assessor as well as the State and County Assessor and was never notified of this levy.

"I would like to know whether or not I can legally make this assessment under this levy in view of my lack of notice thereof."

After a tax levy is made by the governing body of a municipality under Title 37, Section 700, Code of Alabama 1940, notice to the tax assessor is provided for by said section as follows:

". . . After such levy is made it shall be the duty of the mayor or presiding officer or clerk or other clerical officer of such municipality on or before the first day of June next succeeding the levy to certify and deliver to the tax assessor of such county in which such municipality is situated a copy of the resolution or ordinance passed by such city council, board of commissioners or other governing body in and by which taxes are levied for such municipality for the next succeeding tax year commencing on the first day of the next succeeding October, . . ."

Since you now know about the tax levy, I view your request as one relating to the failure to notify you by June 1, 1953, as required by said Section 700, supra.

The purpose of the certification to the tax assessor of the levy is to allow him sufficient time within which to compile the municipal assess-

ments. Quarterly Report of Attorney General, Vol. 33, page 26. If you still have time to do this before October 1, 1953, the fact alone that you were not notified of the levy by June 1, 1953, would not, in my opinion, render the assessment invalid.

As a general rule, statutory directions which have for their object the protection of the taxpayer against spoilation or excessive assessment must be treated as mandatory. But, if there be enough to show that the assessment is so made and evidenced as to be understood, then regulations designed for the information of the assessor or other official intended to promote dispatch, method, system, and uniformity in modes of procedures are merely directory.

So, clerical and ministerial duties, the observance and nonobservance of which do not affect the taxpayer injuriously, must be classed as directory. **State Auditor v. Jackson County**, 65 Ala. 142; 61 C. J., Taxation, page 562; 51 Am. Jur., Taxation, page 618.

You can therefore, in my opinion, legally make the assessment if you can do so before October 1, 1953.

Yours very truly,

SI GARRETT

Attorney General

August 12, 1953

Mr. John Britton, Chairman

Department of Corrections and Institutions

State of Alabama

Montgomery, Alabama

Corrections and Institutions—Merit System.

The Board of Corrections may appoint one confidential assistant or secretary under the provisions of Title 55, Section 301, Code of Alabama 1940, as amended by Act No. 349, General Acts, 1943, page 332, and the Commissioner of Corrections may appoint, with the approval of the Board, two deputy commissioners, not subject to the Merit System, under the provisions of Act No. 202, Acts 1953(Ms.), approved July 17, 1953.

Opinion by Assistant Attorney General Straub.

Dear Sir:

Your request for an official opinion, bearing date of August 5, is as follows:

> "Will you please give us a written opinion as to whether or not the Board of Corrections has authority to employ a secretary to the Board, as provided in the laws of the State Merit Board, effective March 1, 1952, Rule No. 24.
>
> "This would be in addition to the two Deputy Commissioners as provided in Senate Bill 27 which was passed by the 1953 Legislature and approved by the Governor.
>
> "We would appreciate this information before Monday, August 10, as we have a Board meeting scheduled for that date."

Act No. 202, Acts 1953 (Ms.), approved July 17, 1953, provides, in Section 4, as follows:

> ". . . All of the employees of the Board except the Commissioner of Corrections, the Deputy Commissioners of Correction not to exceed two, shall be subject to the provisions of law with respect to the method, selection, classification and compensation of state employees on a basis of merit."

Looking to the "provisions of law with respect to the method, selection, classification, and compensation of the state employees on a basis of merit," we turn to Title 55, Section 301, Code of Alabama 1940, as amended by Act No. 349, General Acts 1943, page 332, which provides in part as follows:

> "The unclassified service shall include: one confidential assistant or secretary for each board, commission, and elected officer and when requested by the Governor for each department head appointed by the Governor . . . ."

This provision has also been embodied in the Rules of the State Personnel Board, State of Alabama, Revised January, 1952, effective March 1, 1952.

Civil service laws generally recognize the appropriateness of exempting positions of a confidential nature. 10 Am. Jur., Civil Service, Section 13.

The reason, of course, behind this exemption is that the competency of an individual, as determined by examination, might not always determine his fitness for a confidential relationship with his superior. **Chittenden v. Wurster,** 152 N.Y. 345, 46 N.E. 857.

There can be no doubt that the Board of Corrections provided for in Act No. 202, supra, is a board within the meaning of Section 301, as amended, supra, and hence entitled to a confidential secretary or assistant under that section.

In addition, the Legislature has seen fit to provide the board with two

deputy commissioners to be appointed by the Commissioner, whose positions, not necessarily of a confidential nature, are not within the provisions of the State Merit System statutes.

It is my opinion that the Commissioner of Corrections, with the approval of the Board of Corrections, may appoint two deputy commissioners under the provisions of Act No. 202, supra, and the Board of Corrections may appoint one confidential assistant or secretary under the provisions of Section 301 as amended, supra.

Yours very truly,

SI GARRETT

Attorney General

August 24, 1953

Hon. David E. Dunn

Judge of Probate

Montgomery County

Montgomery, Alabama

Opinion Overruled, Modified or Distinguished—Motor Vehicles —License Tags—Contractors.

1. Persons who operate privately owned vehicles in performing contracts with the United States to haul the mail are liable for motor vehicle license tags on each of the motor vehicles so used in this State.

2. Opinion found in Biennial Report of Attorney General, 1932-34, page 273, is hereby overruled, modified, and amended so as to conform with the above conclusion.

Opinion by Assistant Attorney General Burton.

Dear Sir:

Your request for an official opinion bearing date of July 14, 1953, is as follows:

"In order to clarify the duties of my office concerning the issuance of motor vehicle license tags to certain individuals who have contracts with the Federal Government to carry the U. S. mail in their private motor vehicles, I request that you please give me your official opinion as to whether or not an individual is liable for a motor vehicle license

tag in this state as to a truck or other motor vehicle owned by him in which he carries the U. S. mail under a contract with the Federal Government.

"In the cases that I refer to, the individual owns and operates the truck or other private motor vehicle involved, but has a contract with the Federal Government to carry the mail for a stated rate of compensation. In some of these cases, the owner of the privately owned vehicle involved claims that the vehicle is used exclusively for carrying the mail, under such a contract. Therefore, I would also like to have your opinion as to whether or not, in such cases, the private owner would be liable for a motor vehicle license tag in this state."

In my opinion the persons to whom you refer are liable for an Alabama motor vehicle license tag on each of the motor vehicles which they use in carrying the mail in this State, regardless of whether or not the motor vehicle owned and operated by them in this regard is used by them exclusively to carry the mail.

From what you relate, these people all have contracts with the Federal Government to carry the mail to and from certain designated places in their privately owned motor vehicles and are paid for making such hauls at a stated rate of compensation.

Mere contracts between private persons and the United States do not generally or necessarily make such persons agents or employees of the Federal Government. **Buckstaff Bath House Co. v. McKinley**, 308 U. S. 358, 60 S. Ct. 279; **King & Boozer v. State of Alabama**, 314 U. S. 1, 62 S. Ct. 43; **Esso Standard Oil Co. v. Evans, et al.**, _____ U. S. _____, 73 S. Ct. 800, 97 L. Ed. 741.

The Supreme Court of Alabama has also clearly recognized this principle in holding that persons who operate and own buses under a contract with a county board of education were not agents or employees of the State but were private contractors. In doing so, the Court observed that: "Public office is not created by contract." **Turner v. State**, 226 Ala. 269, 146 So. 601; **Harrison v. State**, 200 Ala. 480, 76 So. 422.

While there are not many cases which can be found which directly deal with persons who contract to carry the mail in their own private vehicles, the cases which can be found in this respect clearly hold that under the circumstances such persons are not agents or employees of the United States, but are independent contractors.

In the case of **State of Washington v. Wiles**, 116 Wash. 387, 199 P. 749, 18 A. L. R. 1163, the Supreme Court of Washington held that one contracting to transport the United States mail is not excused from the duty of ob-

taining state license tags as to the motor vehicles used by him in such business.

In cases involving the Federal Fair Labor Standards Act and the Social Security Act, the Federal courts and authorities have also determined that such persons are independent contractors and, as such, subject to said Federal laws, and are not within the exemption contained therein which expressly excludes the United States and its agencies and instrumentalities. **National Labor Relations Board v. Carroll**, 120 F. 2d 457, 458; **Fleming v. Gregory**, 36 F. Supp. 776; Social Security Act, Bureau of Internal Revenue Rulings, XVI-42-8992, S. S. T. 205, Internal Revenue Bulletin, Cumulative Bulletin 1937-2, pp. 438-440.

These authorities seem to clearly point to the fact that these mail hauling contractors are liable for motor vehicle license tags.

The opinion found in Biennial Report of Attorney General, 1932-34, page 273, is, therefore, overruled, modified, and amended to conform with this opinion.

Yours very truly,

SI GARRETT

Attorney General of Alabama

August 25, 1953

Hon. J. M. Garrett, Jr. Director

Civil Defense Department

State of Alabama

704 Washington Avenue

Montgomery 4, Alabama

Military and Naval Affairs Civil Defense.

1. The law of this State does not require federal funds to be on deposit before State funds can be expended for purchases under the Federal Civil Defense Act, nor is the State of Alabama prohibited from expending State funds in excess of the State's share of the estimated cost.

2. The Director of Civil Defense is not authorized to submit application for advance of funds to the Federal Government in the absence of required laws.

Opinion by Assistant Attorney General Smith.

Dear Sir:

Your request for an official opinion, bearing date of June 10, 1953, is as follows:

"1. A question has arisen concerning an advance of funds by the Federal government in the matching funds program of the Federal Civil Defense Administration.

"Following is an extract from the FCDA Manual which sets forth procedures concerning advance of funds:

" 'Under either of the two conditions outlined below, advances of funds may be made to States to be applied to the Federal share of the cost of State-procured items.

" 'a. The State law requires funds on deposit, in addition to is own, available for obligation and expenditure to cover the estimated cost of equipment.

" 'b. The State is precluded from expending State funds in excess of the State's share of the estimated cost of the equipment subject to reimbursement by the Federal Government.'

"In the above FCDA procedure the word 'State' also includes the subdivisions of the State since FCDA deals only with the State.

"2. A 750 gallon fire fighting pumper and 1,000 feet of 2½ inch hose has been approved for the City of Huntsville, Alabama and the Mayor of that city has requested that I apply for an advance of funds for the Federal share of the cost.

"3. Is it mandatory under the laws of the State of Alabama that these funds be procured in advance as set forth in a and b above?

"Would I be justified in signing the inclosed application for an advance of funds under the conditions stated?"

In my opinion both of your inquiries should be answered in the negative.

It is not mandatory, under the laws of this State, that funds be on deposit, nor is this State precluded from expending its own funds in excess of the State's share when purchasing State procured items, where the Federal Government is sharing the expense of these items.

Act No. 49, General Acts 1945, page 51, gives the Governor the following power:

"Section 1. The Governor is hereby authorized and empowered to accept from the Federal government or any agency or instrumentality thereof, in the name of and for the State of Alabama, grants and advances of funds and real or other personal property for any purpose of the State government not contrary to the Constitution of Alabama.

"Section 2. The Governor is further authorized and empowered, insofar as is not specifically prohibited by the Constitution and the then existing statutes, to meet and to require, by his executive order, any other agency or instrumentality of the State government to meet the terms and conditions imposed on such grants and advances in acts of the Congress of the United States, executive orders of the president of the United States, or any rule, regulation, or order of any other agency or instrumentality of the Federal government, it being the intent of this act to permit the State of Alabama to participate fully in grants and advances made available to it by the Federal government."

The Governor may delegate to any agency or instrumentality of the State government his powers and authorities herein provided for. However, there has been no executive order by the Governor, which effectuates either of the requirements of the Federal Civil Defense Administration in issuing advances to states purchasing items under this program.

The Alabama Civil Defense Act (Act No. 14, General and Local Acts 1951, page 180) contains nothing which would make an advance of Federal funds mandatory as required by the Federal Civil Defense Administration. Section 15 of the Alabama Civil Defense Act stipulates conditions under which a grant from the Federal government may be accepted. This section is in part as follows:

"(a) Whenever the Federal Government or any agency or officer thereof shall offer to the State, or through the State to any political subdivision thereof, services, equipment, supplies, materials, or funds by way of gift, grant, or loan, for purposes of civil defense, the State, acting through the Governor, or such political subdivision, acting through its governing body, may accept such offer and upon such acceptance the Governor of the State or governing body of such political

subdivision may authorize any officer of the State or of the political subdivision, as the case may be, to receive such services, equipment, supplies, materials, or funds on behalf of the State or such political subdivision."

In my opinion you would not be justified in signing the application for an advance of funds from the Federal Civil Defense Administration for the reason that an advance of funds is not mandatory under the law of this State.

Yours very truly,

SI GARRETT

Attorney General

August 26, 1953

Hon. J. E. Putnam,

City Clerk of Phenix City,

Russell County

Phenix City, Alabama.

Municipalities—Elections—Officers and Offices.

1. The election of city commissioners for the city of Phenix City, Alabama, is governed by the provisions of Title 37, Sections 35-88, inclusive, Code of Alabama 1940, since Act No. 263, Local Acts 1947, page 137, has been declared unconstitutional by the Supreme Court of Alabama, but only one is to be elected in September, 1953.

2. A city commissioner holding office after the expiration of his term which is fixed by law, under the hold-over clause, "until his successor shall be elected and qualified for office," holds office only for a reasonable time, and if no legally elected successor qualifies within said reasonable time, the office is vacant.

3. Where all three offices of city commissioner of the city of Phenix City, Alabama, are vacant for any cause, and there is no way provided by law for the filling of such vacancies, the Governor appoints qualified persons to fill the unexpired terms of such officers.

Opinion by Assistant Attorney General Madison.

Dear Sir:

Your request for an official opinion bearing date of August 15, 1953, is as follows:

"The minutes of the City of Phenix City show the following history: The qualified electors of the City of Phenix City, Alabama, petitioned the Probate Judge the question of 'whether or not the City of Phenix City shall be organized under the Commission Form of Government according to the provisions provided by the Code of Alabama 1923, provisions of Section 2337 and the Acts supplemental thereto.' The results of this election by the qualified voters of Phenix City was the adoption of the Commission Form of Government and an election to elect the first three Commissioners for the City of Phenix City was held on the 17th day of September, 1928, and the following candidates were elected as Commissioners of the City of Phenix City for a term of 3 years; Claude B. Gullatt, Sr., Walter E. Sherrer, and Earnest L. White.

"On the 10th day of July, 1929, Claude B. Gullatt, Sr., resigned his position on the Board of Commissioners and the two remaining members (Walter E. Sherrer and Earnest L. White in a regular meeting July 10, 1929) elected Mr. J. W. Cone as a member on the Board of Commissioners to serve the unexpired term of Mr. Gullatt. On the 21st day of September 1931, the following members were elected to the Board of Commissioners: Dr. Ashby Floyd, Sr., for a term of three years, Dr. R. C. Prather for a term of 1 year, H. D. Cobb and C. B. Gullatt, Sr., being the two highest candidates for the two-year term neither receiving a majority. A run-off election was set for the 28th day of September, 1931. Mr. H. D. Cobb being unopposed in the run-off election was declared elected.

"On the 4th of August, 1932, an election was held to determine whether or not the qualified voters of Phenix City desired to abandon the Commission Form of Government. (The results of this election was to retain the Commission Form of Government.)

"On the 19th day of September, 1932, Mr. A. L. Gullatt was elected to the Board of Commissioners for a term of three years to succeed Dr. R. C. Prather.

"On the 18th day of September, 1933, H. D. Cobb was elected to succeed himself for a term of three years.

"On September 17, 1934, Dr. Ashby Floyd was elected to succeed himself for a term of three years.

"On September 16, 1935, Mr. A. L. Gullatt was elected to succeed himself for a term of three years.

"On the 21st day of September, 1936, H. D. Cobb was elected for a term of three years to succeed himself.

"On September 20, 1937, Dr. Ashby Floyd was elected to succeed himself for a term of three years.

"On the 19th day of September, 1938, A. L. Gullatt was elected to succeed himself for a term of three years.

"On the 16th day of September, 1940, no candidate received a majority. A run-off election was held on the 23rd day of September, 1940, Mr. E. E. Reese was elected to succeed Dr. Ashby Floyd.

"On the 15th day of September, 1941, A. L. Gullatt succeeded himself for a term of three years.

"September 21, 1942, H. D. Cobb succeeded himself for a term of three years.

"On the 20th day of September, 1943, E. E. Reese was elected to succeed himself for a term of three years.

"On September 18, 1944, A. L. Gullatt succeeded himself for a term of three years.

"On the 17th day of September, 1945, H. D. Cobb was elected to succeed himself for a term of three years.

"On the 16th day of September 1946, E. E. Reese was elected to succeed himself for a term of three years.

"In accordance with the provisions of the Legislative Act (No. 236), House Bill 222, Cole and Brassell, approved July 29, 1947, providing for a five man Commission Form of Government for the City of Phenix City, on August 5, 1947, the Hon. Gov. James E. Folsom appointed Messrs. Otis W. Taff and J. D. Harris as members of the City Commission enlarging the numbers of the City Commission from three to five. On the 15th day of September, 1947, the following members were elected to succeed themselves for three year terms: Otis W. Taff, A. L. Gullatt, and J. D. Harris.

"On the 20th day of September, 1948, Mr. Homer D. Cobb was elected to succeed himself for a term of one year.

"On September 19, 1949, Mr. H. D. Cobb and E. E. Reese were elected to succeed themselves for a term of three years.

"On September 18, 1950, Otis W. Taff, A. L. Gullatt, and J. D. Harris were elected for a term of three years and Roy M. Greene was elected to fill the unexpired term of the late H. D. Cobb (two years).

"In September, 1951, there was no expiration of term of office, therefore, there was no election.

"On the 8th of April, 1952, Mr. Roy M. Greene resigned as a member of the City Commission and in the same meeting the City Commission accepted the resignation of R. M. Greene and appointed Mr. Leonard A. Coulter to fill the unexpired term of Mr. Greene (until October, 1952).

"On September 15, 1952, Leonard A. Coulter and Elmer E. Reese were elected to succeed themselves for a term of three years.

"On the 17th of January, 1953, our Hon. Mayor, the late J. D. Harris, died and the four remaining Commissioners (O. W. Taff, Leonard Coulter, A. L. Gullatt, and Elmer E. Reese) failed to reach an agreement on an appointment to fill the vacancy caused by the late J. D. Harris.

"On August 10, 1953, the Hon. J. B. Hicks, Judge of Russell County Circuit Court, rendered a decision on the constitutionality of the local legislative Act of 1947 (setting up the five man Commission Form of Government for the City of Phenix City) attacked by "Russell Betterment Association" approximately two years previously. In his decree he held that J. D. Harris, O. W. Taff, and R. M. Greene were unlawfully holding office. Roy M. Greene having resigned April 9, 1952, and being replaced by the appointment of Leonard A. Coulter, J. D. Harris having died January 17, 1953, the effect of the decree was the removal from office of O. W. Taff and L. A. Coulter, leaving on the Commission E. E. Reese and A. L. Gullatt who having been the last constituted elected officials for the City of Phenix City under the General Bill for Class D cities as provided for in the Code of Alabama 1940, Title 37, Subsection 72 (2376). The remaining two members (A. L. Gullatt and Elmer E. Reese) on the 11th day of August, 1953, appointed Dr. Seth Floyd as a member of the Board of Commissioners. The next action of the Commission being to nominate and appoint Dr. Seth Floyd as Mayor. The above named officials (Dr. Seth J. Floyd, Mayor, A. L. Gullatt, Commissioner, and E. E. Reese, Commissioner) are now serving as the legally constituted governing body of the City of Phenix City, Alabama.

"The question has arisen as to the legal method and procedure for the September 21st election—how to comply with the provisions of the

Code of Alabama 1940, Title 37, Subsection 41, which provides in one instance the election of three officials for a term of three years. The writer interprets this to mean and apply only in the case abandonment of Aldermanic Form of Government and adoption of the Commission Form of Government and the election of three commissioners for the first Commission Form of Government and since the Commission Form of Government was adopted and this method complied with. On the 17th day of September 1928, the election of the three Commissioners for three years and on the 21st day of September, 1931, Commissioners were elected in compliance with Title 37, Subsection 41, which reads—(in part) 'Three Commissioners shall be elected for a period of one, two, and three years respectively.' On the 19th of September, 1932, the qualified electors of the City of Phenix City began to elect the officials for the City of Phenix City for a term of three years and continued to do so until September 15, 1947, when Taff, Gullatt, and Harris were elected under the provisions of the local Legislative Act of 1947, providing for a five man Commission Form of Government for Phenix City.

"The writer requests a legal ruling from your office setting up the legal procedures, methods, number of candidates and terms of office for the governing body to be elected in the coming September 21st, election.

"I have prepared for your convenience a guide showing the officials elected September 17, 1928 (the time Phenix City adopted the Commission Form of Government), to the last election September 15, 1952 (under the 5 man Commission Form of Government). I would appreciate a ruling at the earliest possible moment since the deadline for qualifying in the coming election (September 21, 1953) is midnight, August 31, 1953.

The city of Phenix City, Alabama, was, before the passage of Act No. 236, Local Acts 1947, page 137, operating under a commission form of government, whose validity was upheld in **State, ex rel. Smith v. Gullatt**, 218 Ala. 371, 118 So. 746. This form of government came into being and the city had its powers from Title 37, Sections 35-88, inclusive, Code of Alabama 1940.

Under this form of city government, three commissioners are elected. The terms of office of the three first elected commenced immediately upon their election and qualification, and they held office until the first Monday in October of the third year following. But Section 41 of Title 37, supra, provided for the election and terms of office of subsequent commissioners as follows:

". . . and an election shall be held on the third Monday in September of the year preceding the expiration of the term of office of said three commissioners, at which election three commissioners shall be elected for a period of one, two and three years respectively, and on the same

date of each succeeding year for the member of the board of commissioners, whose term shall expire in that year, the commissioner then elected shall hold office for a term of three years from the first Monday in October of said year, **and until his successor shall be elected and qualified for office.**" (Emphasis supplied.)

So, applying Section 41, supra, to the facts of this case, A. L. Gullatt was elected September 18, 1944, to serve until October, 1947; H. D. Cobb was elected September 17, 1945, to serve until October, 1948; and E. E. Reese was elected September 16, 1946, to serve until October, 1949. These were the last commissioners elected under the provisions of the general law set forth above. After the expiration of their said terms of office, they could only then serve until the election and qualification of their successors, as provided by the hold-over clause set forth in said Section 41, supra.

On July 29, 1947, Act No. 236, supra, was approved. This Act provided for five commissioners instead of three and made provision for their future election and qualification. Elections have been held under Act No. 236, supra, but these elections are void in that Act No. 236 was, on August 6, 1953, declared to be unconstitutional by the Supreme Court of Alabama in the case of **State of Alabama, ex rel. Hugh Britton, et al v. J. D. Harris, et al,** 4th Div. 707.

As to the invalidity of these elections, see also **State v. Johnson,** 243 Ala. 114, 8 So. 2d 890.

It is, therefore, my opinion that the city of Phenix City, Alabama, still has a commission form of Government just as it had before the passage of Act No. 236, supra, with the number and manner of election of the commissioners fixed and provided for by the provisions of Sections 35-88, inclusive, supra.

If elections had continued under these general provisions of the law, the Gullatt term would have been for the periods October 1947-October 1950, October 1950-October 1953; the Cobb terms would have been October 1948-October 1951, October 1951-October 1954; and the Reese terms October 1949-October 1952, October 1952-October 1955. So, it is seen that in September, 1953, one commissioner only is to be elected. The second commissioner will be elected in September, 1954, and the third in September, 1955. Each election will be for a term of three years.

The situation is then that Gullatt, Cobb, and Reese, having all been elected under the provisions of Sections 35-88, inclusive, supra, and their terms ending October 1947, October 1948, and October 1949, respectively, they could serve only until the expiration of their respective terms, and until the election and qualification of their respective successors. Section 41, supra. There having been no successors legally elected to take office

after the expiration of their respective terms of office, the question is presented as to how long after the expiration of their respective terms could they serve before vacancies in office would occur.

In dealing with the hold-over clause, "and until his successor shall be elected and qualified for office," the Supreme Court of Alabama has said:

> "We regard it as the settled law of this state that the words 'until his successor is elected and qualified' were never intended to prolong the term of office beyond a reasonable time after the election, to enable the newly elected officer to qualify." **Prowell v. State, ex rel. Hasty, et al.**, 142 Ala. 80, 39 So. 164.

If no one appeared to legally qualify within this reasonable time, there would be a vacancy to be filled as the law directs. **City Council of Montgomery v. Hughes,** 65 Ala. 201; **State v. Rice,** 230 Ala. 608, 162 So. 292; **Benefield v. Cottle,** 254 Ala. 520, 49 So. 2d 224. It is to be here noted that the time for filing bond and taking oath of office is fixed as "on or before the first Monday of the month succeeding his election." Section 71, Title 37, supra.

In my opinion, the authorities above cited show that more than a reasonable time has elapsed since the end of the terms of Gullatt, Cobb, and Reese, who were last elected under the applicable general law; and since no legally elected successors have appeared and qualified for the subsequent terms as required by law, vacancies now exist in all three offices of commissioner of the city of Phenix City, Alabama. It is my further opinion that neither Section 72 nor Section 87 of Title 37, supra, provides for filling the said vacancies, but the same should be filled by the Governor under the provisions of Title 41, Section 177, Code of Alabama 1940, which provides as follows:

> "Whenever any office of the state, of any county, or municipality thereof, is vacant from any cause, and there is no way provided by law for the filling of such vacant office, the governor shall appoint a qualified person to fill the unexpired term of such office."

The case of **State v. Johnson,** supra, clearly indicates that said Section 177, supra, would be applicable here.

You are, therefore, advised that there presently exist vacancies in each of the three offices of city commissioner of the city of Phenix City, Alabama. The terms of these offices expire October 1953, October 1954, and October 1955, respectively. It is my opinion that the Governor is presently authorized to fill the unexpired terms in each of said offices.

Yours very truly,

SI GARRETT

Attorney General

August 26, 1953

Hon. W. J. Terry

State Superintendent of Education

State of Alabama

Montgomery, Alabama

Schools—County Boards of Education—City Boards of Education—Colleges and Universities—State Board of Education—Merit System.

1. The salaries of personnel employed by the State Department of Education and performing specialized services in the various fields of education are subject to determination by the State Board of Education, upon the recommendation of the State Superintendent of Education, in compliance with the State Merit System pay plan, under Title 52, Section 36, Code of Alabama 1940.

2. Personnel of the State Department of Education engaged in performing specialized services in the various fields of education are State employees whose positions are covered by the State Merit System Law, such positions being in the "classified service" of the State.

3. The fact that the salaries and travel and office expenses of personnel of the State Department of Education, engaged in performing specialized services in the various fields of education, are paid from federal or foundation trust funds, does not exempt such personnel from coverage by the "classified service" of the State Merit System.

4. State institutions of higher learning and county and city boards of education may properly advance funds for payment of the salaries and travel and office expenses of personnel of the State Department of Education, engaged in performing specialized services in the various fields of education, such institutions and boards being reimbursed therefor by the State Department of Education.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion, bearing date of June 8, 1953, is as follows:

"The State Board of Education is required by law to determine the

compensation of all employees of the Department of Education, upon recommendation of the State Superintendent of Education, subject to the provisions of the merit system (Code of 1940, Title 52, Section 36).

"Positions in the State service are classified as exempt, classified, and unclassified by the Code of 1940, Title 55, Section 301. Exempt service includes among others, employees of the State institutions of higher learning, teacher training institutions, educational institutions which are controlled by boards of trustees or similar governing bodies, secondary agricultural schools, and vocational schools. The unclassified service includes a confidential secretary for each board, commission, and elected officer. The classified service includes all officers and employees in the State service not exempt or unclassified.

"The State Department of Education, under the administration of the State Board of Education, renders supervisory services in certain specialized fields of education. It appears that these services may be rendered more efficiently from district offices located at several places in the State. Some of these services may be administered more efficiently through State institutions of higher learning and trade schools. Other services may be administered through county and city boards of education to advantage. It is contemplated that agreements may be entered into between the State Board of Education and the institutions and the county or city boards of education whereby the latter would advance their funds to pay the salaries, travel, and office expenses of State employees engaged in these services as such items become due upon condition that the State Department of Education would reimburse such expenditures upon receipt of claims to be presented. Reimbursements would be made from State appropriations for the specific programs involved and from trust funds received from foundations, and the Federal government for such purposes. Employees so engaged and so paid would be responsible to the State Board of Education through its administrative officer and would not be subject to the regulations of the institutions or boards advancing funds for the payment of their salaries.

"I desire your official opinion on the following questions concerning the procedure outlined above:

"1. Would it be necessary for the State Board of Education, upon recommendation of the State Superintendent of Education, to approve the salaries of employees employed and paid in this manner as required for salaries of other employees as required by Title 52, Section 36?

"2. Would the positions held by employees employed and paid in this manner be exempt from the merit system as defined by Title 55, Section 301 or would they belong in the classified service?

"3. If salaries, travel, and office expenses paid in the manner outlined above are payable from federal or foundation trust funds instead of from state appropriations, would your answers to questions 1 and 2 be the same?

"4. Would State institutions and county or city boards of education violate any state laws in advancing their funds to pay the salaries, travel, and office expenses for services as they become due on condition that they be reimbursed by the department of education?"

1. In my opinion, your first question should be answered in the affirmative.

Title 52, Section 36, Code of Alabama 1940, provides as follows:

"The state board of education upon recommendation of the state superintendent of education shall determine the compensation of all employees in the department of education subject to the provisions of the merit system."

You state that the employees in question are engaged, in behalf of the State Department of Education, in rendering supervisory services in certain specialized fields of education. You explain that, from the standpoint of administrative procedure, these services can be rendered more efficiently through district offices, located at various points throughout the State, and through institutions of higher learning, trade schools, and county and city boards of education. You explain that, for administrative purposes, the salaries, travel expenses, and office expenses of the personnel engaged in rendering these services are, by agreement between the State Board of Education and the institutions of higher learning and the county and city boards of education, advanced by such institutions and boards, which are reimbursed therefor by the State Department of Education. You further state that the employees so engaged are responsible to the State Board of Education, which pays their salaries from State appropriations, from trust funds, and from the federal government.

It is, therefore, my opinion that all such employees are "employees in the department of education," within the meaning of Section 36, supra, and that the State Board of Education may, upon the recommendation of the State Superintendent of Education, determine their compensation, subject to the provisions of the State Merit System and in compliance with its pay plan.

2. In answer to your second question, it is my opinion that the positions held by the employees in question are not exempt positions under the State Merit System, as exempt positions are defined by Title 55, Section 301, Code of Alabama 1940, as last amended by Act No. 349, General Acts 1943, page 332. That section as amended, defines the exempt service as including:

> "All offices and employees of the state's institutions of higher learning, teacher training institutions, and normal schools; all officers and employees of all educational, eleemosynary and correctional institutions which are governed and controlled by boards of trustees or similar governing bodies, and secondary agricultural and vocational schools."

Even though certain of the employees in question are, for payroll purposes, carried on the payrolls of certain institutions of higher learning, their salaries eventually are paid by the State Department of Education, and the employees' duties and work are subject to this department's regulation and control. Their salaries are fixed by the State Department of Education. They are State employees, not employees of the institutions of higher learning on whose payrolls they are carried as a matter of convenience to the State Department of Education. Since they are not within the definition of the "unclassified service," it follows that they are covered by the definition of the "classified service," which, as defined by Section 301, as amended, supra, includes all officers and positions in the State service which are in neither the "exempt service" nor the "unclassified service."

In this connection your attention is invited to that part of Section 301, as amended, supra, providing as follows:

> "Except as to services denominated as exempt or unclassified services hereinabove, the governor shall have the power by executive order to extend the provisions of this chapter to include additional positions or classes of positions."

3. Your third question is answered in the affirmative. In my judgment, the source of the monies used to pay the salaries and travel and office expenses of the employees in question is immaterial. Regardless of the fact that it may come from the federal government or from foundation trust funds, it comes to the State Department of Education, which must authorize and supervise its expenditure. Furthermore, the fact that some of the employees in question may have their salaries paid with money which originates in Washington does not make them employees of the federal government. They are hired, fired, and controlled by the State of Alabama and its State Department of Education, not by the United States Government or any of its departments, boards, bureaus, commissioners, or agencies, and are not covered by the federal civil service laws.

4. In my opinion, your fourth question should be answered in the negative.

I am advised by you that the specialized services performed by such personnel come under the duties of the State Department of Education as set out in Title 52, Section 3, Code of Alabama 1940, which provides for assisting in the execution of the policies and procedures authorized by law and by regulations of the State Board of Education.

The educational activities described are of legitimate interest and benefit to the various institutions of higher learning and to county and city boards of education, for the reason that the activities consist of services which, at least to some extent, might otherwise be performed by the local educational units. Since these educational activities are of mutual benefit to both the State and its political subdivisions, I think that the local unit can properly advance its funds to pay the monthly salaries of such personnel, under an agreement whereby the local unit is reimbursed by the State Department of Education. See Quarterly Report of Attorney General, Vol. 47, page 148.

Very truly yours,

SI GARRETT,

Attorney General

August 27, 1953

Dr. J. S. Tarwater, Superintendent
The Alabama State Hospitals, and
The Partlow State School
Tuscaloosa, Alabama

Alabama Insane Hospitals—Partlow State School—Property.

Lands belonging to the Partlow State School for Mental Deficients, otherwise subject to sale, may be sold by authority of its Board of Managers, but the conveyance shall be invalid and void unless approved in writing by the Governor on the face thereof.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, bearing date of August 18, 1953, is as follows:

"I respectfully request an official opinion on the following:

"Can land belonging to The Partlow State School for Mental Deficients located in Tuscaloosa, Alabama be sold by authority of the Board of Managers, or must it be done by the Governor acting for the State of Alabama?

"The Bethel Church, adjoining some wooded land belonging to The Partlow State School, desires to buy approximately one acre of land

from The Partlow State School for the purpose of erecting a house for the minister. This church also desires to buy from The Partlow State School less than one acre adjoining the present church cemetery for the purpose of enlarging the cemetery."

I am of the opinion that lands belonging to the Partlow State School for Mental Deficients, otherwise subject to sale, may be sold by authority of its Board of Managers, but the conveyance shall be invalid and void unless approved in writing by the Governor on the face thereof.

In an opinion of this office rendered to the Superintendent of the Alabama State Hospitals and The Partlow School, Tuscaloosa, Alabama, on October 9, 191 (Quarterly Report of Attorney General, Vol. 25, page 38), it was held that the Board of Managers of the Partlow State School for Mental Deficients was authorized to sell or grant a right of way or to enlarge a presently existing right of way for a public highway over, along or through said school's lands. The reasoning of said opinion was based on the theory that since the Board of Trustees of the Alabama State Hospitals, under Title 45, Sections 189-190, Code of Alabama 1940, is vested with the possession and control of all property belonging to said hospitals, with the "power to sell and convey any real property of the hospitals," the Board of Managers of the Partlow State School for Mental Deficients is likewise vested with the same power and authority over its lands. The following observations were therein made:

"I am of opinion also that the Board of Managers of the Partlow State School for Mental Deficients (Code 1940, Title 45, §§231, 232) is authorized to grant a right of way, or to extend or enlarge a presently existing right of way for a public highway, over the lands belonging to said school. Said board is composed in part of the seven trustees of the Alabama State Hospitals, and said school, as will appear from Chapter 6, Title 45, Code of 1940, is an adjunct to or extension of said hospitals and operated largely in conjunction therewith. The statutory law creating both the hospitals and the school should be considered and construed as a unit, and although Chapter 6, supra, does not expressly authorize the Board of Managers to grant rights of way over the school's lands, it vests in said board management and control of said school and, by implication therefore, of the school's property, including its lands.

"By the same process of reasoning and inasmuch as the statutes creating and regulating the hospitals and the school are in pari materia, I conclude that the board of managers of the school should exercise the same powers with reference to the school's lands as are exercised by the hospital trustees with reference to the hospital lands."

Following the same line of reasoning and going one step further, I reach the conclusion that the Board of Managers of the Partlow State

School for Mental Deficients has the same authority to sell its lands, otherwise subject to sale, as it has to sell or grant rights of way thereon.

Your attention is invited to the following provisions of law relative to the execution of such conveyances: Title 47, Section 54, Code of Alabama 1940, as follows:

"§ 54. Conveyances by department, commission, or agency, when legal title not vested in state.—All conveyances of real estate made by any department, commission, or other agency of the state, when the legal title to any property is vested in any department, commission, or other agency of the state, shall be invalid and void unless approved in writing by the governor on the face of such conveyance."

Title 47, Section 55, Code of Alabama 1940, as last amended by Act No. 639, General and Local Acts 1951, page 1094, provides in pertinent part as follows:

"(a) All leases, contracts of exchange, or other dispositions of real estate for more than one year made by any department, commission, or other agency of the State of Alabama, shall be invalid and void unless approved in writing by the governor on the face thereof."

It appears that under either of the two above quoted provisions of law that the conveyance would be invalid and void unless approved in writing by the Governor on the face thereof.

Very truly yours,

SI GARRETT,

Attorney General

August 27, 1953

Mrs. Agnes Baggett

Secretary of State

CAPITOL

Secretary of State—Department of Finance.

1. (a) The Director of Finance may, with the approval of Secretary of State, sell, exchange, or otherwise dispose of damaged sets or volumes of the Code of Alabama 1940, which are now in stock, at such a price as may appear reasonable to the Director of Finance.

(b) The Secretary of State is authorized to sell volumes

of the acts of Alabama, which are damaged from storage to such such price or prices as may be deemed most expedient to such officer.

2. Used volumes of the Code of Alabama 1940 now in stock may be sold, with the approval of the Secretary of State, by the Director of Finance, in accordance with provisions of Title 55, Section 145, Code of Alabama 1940.

3. The Secretary of State is without authority to break a set of the Code of Alabama 1940 in order to replace separate volumes requested by state and county officials pursuant to Section 3 of Act No. 650, General Acts 1939, page 1023.

Opinion by Assistant Attorney General Grant.

Dear Mrs. Baggett:

Your request for an official opinion, bearing date of June 22, 1953, is as follows:

"I have received a number of requests from students of Jones Law School for single volumes of the Alabama Code of 1940.

"At present our stock of odd volumes of the Code is limited to Volumes 1, 2, 9 and 10. Many of these are damaged by moisture from the air conditioning unit in the storeroom, and are unfit for sale at the regular price of $6.75 per volume.

"We also have a few books which have been returned to this office by state and county officials to be exchanged for new ones.

"I hereby request an official opinion on the following questions:

"1. May single volumes or complete sets of the Alabama Code of 1940, and volumes of the Acts of Alabama, which have been damaged while in storage, be sold at a price less than that prescribed for new books?

"2. May used books received from state and county officials for exchange purposes be sold at a reduced price?

"3. Is the Secretary of State authorized to break a set of the Code in order to replace separate volumes requested by affidavit from state and county officials in pursuance of Section 3 of Act No. 650 of the 1939 Acts?

"I shall greatly appreciate an early reply to the above questions."

Your question No. 1 is being divided into subsections (a) and (b);

subsection (a) relating to the sale of single volumes or sets of the Alabama Code of 1940 which have been damaged while in storage, and subsection (b) relating to the sale of acts of Alabama which have likewise become damaged while in storage.

Section 4 of Act No. 650, General Acts 1939, page 1023 (Title 55, Section 197(4), 1951 Cumulative Pocket Part, Code of Alabama 1940), provides that:

> "The Secretary of State is hereby authorized to sell sets of said annotated code to any person, firm, or corporation within or without the State, so long as the same are available for sale, at uniform cash prices as may be determined upon and fixed by the Governor. Provided, however, that the price fixed by the Governor for sales to persons, firms, or corporations shall, in no event, be less than $67.50 per set. Not more than three sets of said annotated code shall be sold to any one person, firm, or corporation. The Governor may fix one price for the sale of sets of said annotated code within the State of Alabama and a larger price for the sale of said sets without the State of Alabama."

I interpret this section as providing for the sale of new (unused) sets of the Code of Alabama 1940. No provision is made within the Act for the sale of volumes, individually, or sets of the books which may have become damaged while in storage. However, there is authority for the sale, exchange, or disposition of personal property of the State determined by the Director of Finance to be no longer needed for public use, or to have become unsuited for such use. Title 55, Section 145, Code of Alabama 1940. This section reads in part as follows:

> ". . . To sell, exchange or otherwise dispose of any personal property of the state determined by the director of finance not to be needed for public use or to have become unsuited for such use. . ."

I am, therefore, of the opinion, based upon the aforesaid authority, that the Director of Finance may, with your approval and consent, sell, exchange, or otherwise dispose of damaged sets or volumes of the Code of Alabama 1940 which you now have in stock, and at such a price as may appear reasonable to the Director of Finance.

In replying to subsection (b) of your question No. 1, pertaining to the sale of Acts of Alabama, it is my opinion that, under the provisions of Title 55, Section 189, Code of Alabama 1940, you, as Secretary of State, are authorized to sell volumes of the Acts of Alabama, which are damaged as a result of being in storage for long periods of time, at such price or prices as may be deemed most expedient to you. This section is as follows:

> "§ 189. Secretary of State authorized to dispose of acts, journals, etc.—The secretary of state may dispose of, at public or private sale, in such quantities and at such price as may be deemed most expedient, all acts,

journals, codes, department reports, and all other books in his custody, excepting the reports of the supreme court of Alabama and the court of appeals, and the codes of 1940; provided that ten copies of each series of the acts and ten copies of the journal of each session of the house and senate, and ten copies of the codes issued prior to 1940 shall be preserved and kept in the custody of the secretary of state."

Your second question concerns used books, books which have accumulated in your stock as a result of your exchanging new sets and volumes of the Code of Alabama 1940 in return for old ones returned to you by state and county officials. Although I find no provision of law for making such exchange, I am of the opinion that the Director of Finance, with your approval and consent, may dispose of such used books now on hand in the manner provided by Section 145, supra.

In replying to your third question, it is my opinion that you, as Secretary of State, are without authority to break a set of the Code of Alabama 1940, in order to replace separate volumes requested by state and county officials pursuant to Section 3 of Act No. 650, supra. This section is as follows:

"Section 3. Duplicate sets of said annotated code, to replace sets lost or destroyed, without fault of the custodian, may be furnished to any officer entitled thereto upon application to the Secretary of State, provided said application is approved by the Governor." (Emphasis added.)

It is to be observed that the Legislature confined the replacement to sets, to replace sets lost or destroyed and no provision whatever is made for the replacement of a single volume, or for any number of volumes less than a full set. It will likewise be observed that the statute makes no provision for the exchange of used books that may be returned by state or county officials, for replacement of new sets.

Very truly yours,

SI GARRETT,

Attorney General

August 31, 1953

Honorable T. O. (Tillie) Walker

Associate Commissioner

Alabama Public Service Commission

Montgomery 1, Alabama

Liquefied Petroleum Gas.

1. Under Section 9 of Act No. 275, General and Local Acts

1951, page 559, the Commission shall require that every person in the business of selling and distributing liquefied petroleum gases, or in the business of selling or installing tanks, etc., maintain storage tank facilities for 15,000 (water) gallon capacity for each one thousand customers, or fraction thereof, serviced. This capacity is exclusive of any tanks or cylinders placed on consumer's property or any tank or tanks consigned to a consumer for use and governed by meter.

2. Section 6 of Act No. 275, supra, gives the Commission broad powers to make and enforce rules and regulations, governing the design, construction, location, installation, and operation of containers, tanks, systems, and equipment for storing, utilizing, handling, and transporting liquefied petroleum gases, and such rules and regulations shall be such as are reasonably necessary for the protection of the health and safety of the public and all persons using such gases; to regulate the quantities that the dealer or distributor may be required to carry in stock; and to make regulations and prescribe the size of tanks that the distributor is to use in meeting the requirement for 15,000 (water) gallon capacity storage facilities.

Opinion by Assistant Attorney General Grant.

Dear Sir:

Your request for an official opinion is as follows:

"Section 9 of Act No. 275 of the 1951 Legislature known as the 'Alabama Liquefied Petroleum Gas Act', has caused considerable confusion in the various interpretations placed upon the word 'storage'.

"We at the commission have received a volume of inquiries concerning same, among which we list the following as examples:

"1. Whether or not this means tanks or cylinders placed on consumer's property or consumer's homes containing liquefied petroleum gas already purchased by the consumer?

"2. Whether or not this includes a dealer-owned tank which has been consigned to a consumer for his use governed through a meter?

"3. Could the storage tank be placed in the state of Alabama by the distributor without containing any liquefied petroleum gas, and if it should contain liquefied petroleum gas to what amounts?

"4. Could the distributor have an accumulation of small cylinders filled with liquefied petroleum gas for sale to consumers with a total capacity of not less than 15,000 gallons for each 1,000 customers?

"5. Does the 15,000 (water gallon capacity) storage mean one huge tank or container, or large tanks or containers of at least 500 or 1,000 water gallon capacity, totalling a minimum of 15,000 gallons capacity?

"We will appreciate it if you will give us a definite interpretation as to the meaning of the legislature in its wording of Section 9 of Act No. 275 of the 1951 legislature.

"Your earliest attention to this matter will be greatly appreciated as we cannot proceed on a definite basis of issuing permits to do liquefied petroleum gas business until we have this interpretation."

Act No. 275, General and Local Acts 1951, page 559, known as "Alabama Liquefied Petroleum Gas Act" regulates the business of selling, distributing, storing, or transporting liquefied petroleum gases. Section 9 of the Act provides:

"Section 9. STORAGE—The Commission shall require that every person in the business of selling and distributing liquefied petroleum gases or in the business of selling or installing liquefied petroleum gas tanks, containers or systems have located within the State of Alabama a minimum of 15,000 (water gallon capacity) storage for liquefied petroleum gases for each one thousand (1000) customers or a fraction thereof serviced by such person. The Commission shall have authority to examine the books and records of such person for the purpose of determining the number of customers serviced by such person. The Commission shall further require such person to present evidence to the Commission that he has a bona fide contract to procure for resale liquefied petroleum gases."

It appears from the foregoing section that it was the intent of the legislature to require that anyone so engaged in selling or otherwise distributing petroleum gases would be adequately equipped for storing sufficient quantities to insure deliveries of demands made upon him by his customers. A person engaged in the business of selling and distributing liquefied gases could be compelled by law to equip his agency for storing 15,000 gallons (water gallon capacity) of petroleum gases for each 1000 customers or fraction thereof. The quantities that he carried in stock for his customer's use could be regulated by the law of supply and demand, or, at its option, by the Commission under other provisions of the law.

I am of the opinion, therefore, that your questions No. 1 and No. 2 are to be answered by construing that "storage" as used in Section 9 of Act 275, supra, means 15,000 (water) gallon capacity storage exclusive of any tanks or cylinders placed on consumer's property, and exclusive of any dealer owned tank or tanks which have been consigned to a consumer or consumers for use governed by meters.

Section 6 of Act No. 275, supra, provides:

"Section 6. DUTIES OF COMMISSION.—The Commission shall have the power to make and enforce rules and regulations governing the design, construction, location, installation and operation of containers, tanks, systems and equipment for storing, utilizing, handling and transporting liquefied petroleum gases, and rules to secure the substantial accuracy of all meters, safety devices and regulators generally used in connection with such gases. Said rules and regulations shall be such as are reasonably necessary for the protection of the health and safety of the public, and persons using such gases, and shall be adopted only after a public hearing thereon. All rules and regulations shall be printed in pamphlet form and shall be mailed to all liquefied petroleum gas dealers registered with the Commission and to any person upon request, provided the Commission may adopt as its own rules the published regulations of the National Board of Fire Underwriters, the National Fire Protection Association, or any other nationally recognized agency covering the same subject, by reference thereto. All rules and regulations so adopted by the Commission shall become effective thirty (30) days after adoption thereof."

The above section gives the Commission board powers to make and enforce rules and regulations governing the sale and distribution of petroleum gases.

In answering your question No. 3, I am of the opinion that, insofar as Section 9, supra, is concerned, there is no requirement that the 15,000 (water) gallon capacity storate facilities for each 1000 customers, or fraction thereof, contain any specified quantities of petroleum gases, or contain any at all. As has been hereinabove stated, the quantity or quantities have been left blank, either for the law of supply and demand to regulate, or for the Commission to prescribe and enforce under provisions of Section 6, supra. It is difficult to conceive of a case wherein a person or distributor engaged in the sale or distribution of petroleum gases would, after meeting the requirements of Section 9, supra, and installing the 15,000 (water) gallon capacity storage facilities for each 1000 customers, or fraction thereof, serviced, fail to keep or maintain an adequate stock of petroleum gases on hand with which to satisfy the reasonable demands made upon him by his customers.

Your question No. 4 should be answered in the affirmative. I find nothing in the Act that would prevent the person engaged in the business of selling or distributing petroleum gases from having an accumulation of small cylinders filled with liquefied petroleum gas, so long as the person or distributor shall have and maintain storage facilities for 15,000 (water) gallon capacity for each 1000 customers, or fraction thereof, serviced.

In considering your question No. 5, I do not find any requirements contained within the Act that would compel the person selling or distribu-

ting liquefied petroleum gases to provide that his storage capacity be constituted of certain size tanks. Compliance with Section 9 of the Act, supra, is met when the person or distributor provides storage facilities of 15,000 (water) gallon capacity for each 1000 customers, or fraction thereof, serviced; and it matters not whether it be one tank of this capacity or several smaller tanks aggregating the total gallonage required.

Under the provisions of Section 6, supra, the Commission is given the power to make and enforce rules and regulations governing the design, construction, location, installation, and operation of containers, tanks, systems, and equipment for storing, utilizing, handling, and transporting liquefied petroleum gases; and such rules and regulations shall be such as are reasonably necessary for the protection of the health and safety of the public and all persons using such gases. I am of the opinion that the Commission, acting under the powers granted it by this section, may make such regulations as are considered reasonable and necessary, and that questions Nos. 3, 4, and 5 of your request would be matters that could be adjusted and regulated by applying such rules and regulations as the Commission may promulgate.

Very truly yours,

SI GARRETT,

Attorney General

September 1, 1953

Hon. K. A. Johnson, Superintendent,

Tuscaloosa County Board of Education,

Tuscaloosa, Alabama.

Counties—Legislature—Notices.

Expense of advertising local bills which are of interest to the county and the people as a whole, and not private or individual bills, shall be paid for by the county, if same become laws, whether signed or not by a member of the Legislature from that county.

Opinion by Assistant Attorney General Madison.

Dear Sir:

Your request for an official opinion bearing date of August 18, 1953, is as follows:

"The Legislature of Alabama passed a County-Wide Sales Tax Act for

Tuscaloosa County, Alabama, on June 2, 1953, same being House Bill No. 285 by Shelton and Morgan, and was approved by the Governor on June 3, 1953, and is known as Act No. 56 of the 1953 Legislature of Alabama, Local Acts. I have at hand a statement from the Tuscaloosa News in the amount of $382.20 for the publication fee of this Local Act, that same amount having already been paid by the City of Tuscaloosa since the City of Tuscaloosa shares in the sales tax revenues.

"It was my opinion that the Tuscaloosa County Board of Revenue should pay the amount of the advertising bill, $382.20, the portion charged to it, on account of Section 174, Title 12, of the 1940 Code of Alabama, as amended by an Act approved July 26, 1951, as follows:

" 'The county governing body of each county of the state shall pay from the county treasury, at the regular legal rate, the cost of the advertising of notice and substance of all local bills which may be introduced in the legislature by any member of the legislature from the county if the notice is signed by any such member, whether such bill is passed by the legislature or not. If the bill is for the benefit of or in reference to subjects or matters exclusively relating to one or more municipalities in the county, the municipality or municipalities shall reimburse the county for the cost of such advertising. If two or more municipalities are liable to reimburse the county for the cost of advertising the same bill, each municipality shall pay to the county an amount which bears the same ratio to the total cost of advertising as such municipality's population bears to the total population of all the municipalities affected by the bill.'

"I am advised that the County Attorney has advised our Probate Judge that the County Board of Revenue should not pay this advertising bill for this local act since the advertisement did not bear the signature of either of the members of the House of Representatives or the Senator from Tuscaloosa County.

"The advertisement was made only after an agreement with Representative J. P. Shelton, Representative Edward Morgan and Senator E. W. Skidmore. All of them were familiar with the proposed Bill and had agreed with the county and municipal authorities and educational leaders to introduce and pass such an Act in the Legislature. The Act was introduced by Representatives J. P. Shelton and Edward Morgan, and same was passed, as hereinabove stated, and is now the law.

"Query:

"1. Should the Board of Revenue of Tuscaloosa County pay this advertising bill for advertising this local act, or is that body relieved from that obligation due to the failure of the proposed Act as published to bear the signature of one of the legislators?

"2. If the former question is answered in the negative, then, am I authorized to pay same out of the Tuscaloosa County School funds?"

Act No. 56, Local Acts 1953 (Ms.), approved June 3, 1953, referred to in your request, is a local act levying a county-wide sales tax for the benefit of the public schools of the city and county of Tuscaloosa, and also for hospital services furnished to charity patients who are resident citizens of Tuscaloosa County, Alabama.

It, therefore, appears that the said local act is of interest to Tuscaloosa County and its people as a whole.

In answering your first question, it is necessary to consider three different statutory provisions.

Title 12, Section 12, Subsection 13, Code of Alabama 1940, as amended by Act No. 344, General Acts 1945, page 560, provides that the county governing body has authority:

"To pay, at the regular legal rate, for the advertising of notice and substance of local bills, which may be introduced in the legislature for the benefit of their respective counties, or in reference to subjects or matters exclusively relating to county business or affairs."

Title 12, Section 174, Code of Alabama 1940, provides as follows:

"§ 174. Payment of expenses of publication of notice of intention to introduce a local bill.—The expense heretofore or hereafter incurred in the publication of the intention to introduce a local bill in the Alabama legislature shall be paid, by the county affected thereby, out of the general funds of said county; provided that in counties having two judicial divisions, in each of which regular terms of the circuit court are held, such publication may be made in both of such divisions at the expense of the county. Provided, that such bills are introduced, passed and become law."

Act No. 286, General and Local Acts 1951, page 571, approved July 23, 1951, provides as follows:

"Section 1. The county governing body of each county of the state shall pay from the county treasury at the regular legal rate, the cost of the advertising of notice and substance of all local bills which may be introduced in the legislature by any member of the legislature from the county if the notice is signed by any such member, whether such bill is passed by the legislature or not. If the bill is for the benefit of or in reference to subjects or matters exclusively relating to one or more municipalities in the county, the municipality or municipalities shall reimburse the county for the cost of such advertising. If two or more municipalities are liable to reimburse the county for the cost of ad-

vertising the same bill, each municipality shall pay to the county an amount which bears the same ratio to the total cost of advertising as such municipality's population bears to the total population of all the municipalities affected by the bill."

Following the reasoning of the opinion of this office reported in Quarterly Report of Attorney General, Vol. 17, page 195, relating to Subsection 13 of Section 12, as amended, supra,, and Section 174, supra, all three of said statutory provisions are to be construed in pari materia. The said opinion held as follows:

"Applying the above rule of statutory construction, it is my opinion that each of the two statutes has a field of operation and that they should be construed in pari materia. One allows the county to pay for advertising of local bills whether same become laws or not. The other makes it mandatory that the county pay for the advertising of those bills that become laws. However, in both instances the bills must be to the interest of the county and the people as a whole and not private or individual bills."

In another opinion of this office reported in Quarterly Report of Attorney General, Vol. 66, page 41, it was stated:

". . . As of July 26, 1951, the effective date of Act No. 286, supra, the newspapers, and everyone for that matter, are presumed to have known that if a publication of such notice was made on or after July 26, 1951, it would not be a charge upon county funds unless signed by a member of the Legislature from that county."

The next above expression, while representing the thinking of this office when written, was not necessary to a decision of the question there presented.

On further consideration, it is my opinion that each of the above three statutory provisions has a field of operation and should be construed in pari materia.

As above stated, Subsection 13 of Section 12, as amended, supra, allows the county to pay whether the bill becomes law or not. Section 174, supra, is mandatory on the county to pay if the bill becomes law. In each instance, however, the bill must be of interest to the county and the people as a whole, and not a private or individual bill.

Act No. 286, supra, makes it mandatory on the part of the county to pay for the advertising of local bills if signed by a member of the Legislature from that county, whether said bills pass or not, and whether or not the county and its people are interested therein. In other words, it may be a private or individual bill, notice of which must be paid for by the county if signed by a member of the Legislature from that county.

Section 174, supra, in addition to its other provisions, provides that in counties having two judicial divisions, in each of which regular terms of circuit court are held, such publication may be made in both of such divisions at the expense of the county.

Act No. 286, supra, makes provision for reimbursement to the county where the subject matter of the bills relates exclusively to one or more municipalities in the county. It also provides that if two or more municipalities are liable to reimburse the county for the cost of advertising the same bill, each municipality shall pay to the county an amount which bears the same ratio to the total cost of advertising as such municipality's population bears to the total population of all the municipalities affected by he bill.

It appearing, as aforesaid, that the local bill under consideration is of interest to Tuscaloosa County and its people as a whole, and each of said statutory provisions having a field of operation, it is my opinion that, since the bill has become law, it is mandatory on the part of Tuscaloosa County to pay for the advertising of notice and substance of said bill, even though it was not signed by a member of the Legislature from that county.

It is a fundamental rule of statutory construction that statutes relating to the same subject should be construed in pari materia and each given a field of operation, if possible. It is my opinion that this principle of law is applicable here.

The conclusion which I have reached in answering your first question makes it unnecessary to answer your second question.

Yours very truly,

SI GARRETT,

Attorney General

September 14, 1953

Hon. Holt A. McDowell

Sheriff

Jefferson County

Birmingham, Alabama

Sheriffs—Costs and Fees.

1. Sheriffs are not entitled to a separate entering and returning fee for executing a writ of restitution in an unlawful detainer case.

2. Sheriffs are not entitled to a separate entering and returning fee for making levy and sale under a writ of execution after judgment.

Opinion by Assistant Attorney General Sanders.

Dear Sir:

Your request for an official opinion, bearing date of August 25, 1953, is as follows:

"I will greatly appreciate an official opinion from your office in answer to the following questions:

"(1) Am I, as sheriff, supposed to claim an entering and returning fee for executing writs of restitution in unlawful detainer cases arising in the Municipal Court of Birmingham (created by Local Laws 1915, page 231) or any other inferior courts of like jurisdiction and Justice of the Peace Courts in Jefferson County.

"(2) Am I, as sheriff, supposed to claim an entering and returning fee for making levy following issuance of execution after judgment rendered in the Circuit or Inferior Courts of this County."

The answer to both of your questions is in the negative.

There is no authority for you to claim an "entering and returning fee," either for executing writs of restitution in unlawful detainer cases, or for levying under execution after judgment in any type of action. (There is, however, provision for an entering and returning fee of twenty-five cents, in addition to the fee for levying, when you levy under a writ of attachment. Title 11, Section 34, Code of Alabama 1940.)

Under Title 7, Section 964, Code of Alabama 1940, justices of the peace are given jurisdiction over unlawful detainer cases. Other inferior courts, such as the Municipal Court of Birmingham, have similar jurisdiction. Title 7, Section 973, Code of Alabama 1940, provides that if the plaintiff is successful in such an action, the justice shall issue a writ of restitution commanding the sheriff or the constable to restore the plaintiff to the possession of his lands. The fees for the sheriff's services in this type of action are prescribed by Title 11, Section 34 Code of Alabama 1940, as follows:

"Serving summons and making return in cases of forcible entry and detainer and unlawful detainer $1.50

"Executing writ of restitution in such cases 5.00

"Other services in such cases, the same fees as in circuit court."

The last sentence, referring to "other services" would obviously refer to such services as the summoning of witnesses and returning subpoenas. It cannot, however, be construed to include an entering and returning fee for the execution of a writ of restitution, since there is no provision for such a fee in the circuit court, or in any other court.

Similarly, in answer to your second question, no provision may be found for an entering and returning fee for levying and selling under execution after judgment. The sheriff's fee for this service is prescribed by Title 11, Section 34, Code of Alabama 1940, in the form of a percentage of the amount collected. This commission is the fee for the entire process of levying and selling the defendant's property as well as for entering and making return of the writ. There being no express authorization for a separate fee for the entering and returning portion of the service in such a case, none may be demanded. Title 11, Section 1, Code of Alabama 1940.

Very truly yours,

SI GARRETT,

Attorney General

September 17, 1953

Hon. W. G. Pruett

State Highway Director

CAPITOL

Highway and Highway Department—Municipalities—Motor Vehicles.

1. Connecting-link streets or roads within a municipality, designated by the Highway Department as State highways, under the provisions of Act No. 284, General and Local Acts 1949, page 408, are State highways.

2. Traffic passing over connecting-link streets or roads, designated by the State Highway Department as State highways, under the provisions of Act No. 284, supra, are subject to length, width, and weight regulations prescribed by Title 36, Section 89, Code of Alabama 1940, as amended by Act No. 179, General Acts 1943, page 159, and subject to the provisions of Title 36, Section 90, Code of Alabama 1940, as amended by Act No. 255, General and Local Acts 1949, page 377.

3. A municipality may by ordinance prescribe maximum limits with respect to weight, height, and length of motor vehicles

traveling within its police jurisdiction, but said maximum limits prescribed by ordinance must not be less than those prescribed by State law.

4. Permits for the movement of oversize, overweight, or overlength commodities upon connecting-link streets or roads within a municipality, which have been designated as State highways, are properly issued by the Director of the Highway Department, and not the municipality.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of July 14, 1953, is as follows:

"Under Title 23, Section 78, Sub-Section 19, 20, 21 and 22, it is made mandatory that the State Highway Department of Alabama take over for maintenance the streets of all municipalities over which State highways are routed. The State Highway Department did on October 1, 1950 take over the streets in these municipalities on an official order by the State Highway Director of Alabama dated July 28, 1950 and same in the minutes of the State Highway Department.

"I will thank you for your opinion as to whether or not anyone wishing to haul motor vehicle loads within the city limits of any municipality which exceed the legal dimensions or gross weight as set out in the law, must first secure a permit as provided by law, from the State Highway Department, or would it be proper that permit for such loads be secured from proper authority of such municipality."

In my opinion, connecting-link roads or highways designated by the State Highway Department as State highways and passing over the streets of a municipality are for all intents and purposes State highways. Traffic passing over such route is subject to the regulations prescribed for length, width, and weight, and other dimensions, the same as other motor vehicles on a State highway. See Title 36, Section 89, et seq., Code of Alabama 1940, as amended by Act No. 179, General Acts 1943, page 159.

I call your attention to certain exemptions under Title 36, Section 90, Code of Alabama 1940, as amended by Act No. 255, General and Local Acts 1949, page 377. This section, among other things, provides that the municipality may by ordinance establish maximum limits with respect to weight, height, length, and width of motor trucks and other vehicles within the police jurisdiction of such municipality, but such maximum limits established by the municipality by ordinance cannot be less than those fixed by the State law. Act No. 179, supra.

In view of the fact that connecting-link streets and roads within a mu-

nicipality are State highways when designated as such by the Highway Director, it is my opinion that permits for movement of oversize, overweight, or overlength commodities over such highways should be issued by the Highway Director according to Title 36, Section 91, Code of Alabama 1940.

The exclusive authority to issue permits to vehicles transporting oversize, overweight, or overlength commodities on State highways, including connecting-link streets and roads within a municipality, belongs to the Director of the Highway Department and not to the municipality. Section 91, supra.

Very truly yours,

SI GARRETT,

Attorney General

September 17, 1953

Hon. L. B. Stephens, Executive Director

State Board of Pardons and Paroles

Montgomery 5, Alabama

Pardon, Paroles & Probation—Bonds—Prisons & Prisoners—Board of Corrections.

1. The Board of Pardons & Paroles may require a parolee to post a bond with sufficient sureties or a cash bond to guarantee payment of expenses incurred in returning said parolee to the State of Alabama.

2. The bond which the parolee is required to post should be made payable to the State of Alabama for the use of the Board of Corrections.

Opinion by Assistant Attorney General Bradley.

Dear Sir:

Your request for an official opinion, bearing date of August 24, 1953, is as follows:

"The Board of Pardons and Paroles has asked that I request your official opinion on the following questions:

"1. The State of Alabama is a signatory to the Interstate Compact on parole and probation supervision (Title 42, Section 27, Code of Alabama, 1940) and frequently sends parolees to other states where they have their families and where they have employment. Occasionally

these parolees violate conditions of parole and it is necessary to return them to prison in the State of Alabama. When they are in distant states this involves considerable expense. Can the Board of Pardons and Paroles legally make a condition of parole which requires the parolees to execute a bond with good and sufficient sureties, or to post a cash bond, to guarantee the payment of expenses incurred in their return to prison in Alabama in the event they violate parole?

"2. When a prisoner is paroled he remains while on parole in the legal custody of the warden of the prison from which he is paroled, and the Board of Corrections returns all parole violators. (Title 42, Section 7, Code of Alabama, 1940 as amended—Pocket Supplement). Therefore, if your answer to Question 1 is in the affirmative, should the bond be made payable to the Board of Corrections?"

The answer to your first question is in the affirmative.

Judge Rice, in the case of **State ex rel. McQueen, Atty. Gen. v. Horton, Probate Judge,** 31 Ala. App. 71, 14 So. 2d 557, said: ". . . it is now, and since the date of the creation of our State Board of Pardons and Paroles, the law that a convict 'released on parole' is to all intents and purposes yet and still suffering punishment and imprisonment. Or at least that that is the legal effect of his being a 'prisoner on parole'."

Futhermore, the State Board of Pardons and Paroles has complete jurisdiction and authority over all parolees and the Board has the unquestioned right to take from the parolee the privilege of parole at its uncontrolled discretion—for its own reasons or for no reason at all. **State ex rel. McQueen, Atty. Gen. v. Horton, Probate Judge,** supra; and **Summers v. State,** 31 Ala. App. 264, 15 So. 2d 500.

Even though a parole is a privilege which may be revoked at will by the Board of Pardons and Paroles, Title 42, Section 5, Code of Alabama 1940, as amended by Act No. 599, General and Local Acts 1951, page 1030, provides that it is the duty of the Board to specify the conditions under which a parole is granted: Also Title 42, Section 9, Code of Alabama 1940, as amended by Act No. 599, supra, provides that the conditions must be specified in writing and a copy given to the parolee.

Therefore, since the Board of Pardons and Paroles has the duty of prescribing the conditions under which a parole will be granted—and I am unable to find any authority limiting that power—it is my opinion that the Board may, as a condition of parole, require a parolee that is going out of the State of Alabama, with the sanction of the Board, to post a bond with good and sufficient sureties or to post a cash bond to guarantee the payment of expenses incurred in returning the parolee to the prison authorities in Alabama, should the other conditions of the parole be violated.

The answer to your second question is in the affirmative.

Section 7, Title 42, Code of Alabama 1940, as amended by Act No. 599, supra, provides that a parolee, while on parole, is under the legal custody of the warden of the prison from which he was paroled. It would logically follow that if a parolee was under the custory of the warden of the prison and said parolee violated his parole the warden would be responsible for his return to prison. In carrying out this duty, the warden acts for the Board of Corrections, a department of the State.

Hence, it is my opinion that the bond which is required to be filed by the parolee as a condition of his parole should be made payable to the State of Alabama for the use of the Board of Corrections.

Very truly yours,

SI GARRETT,

Attorney General

September 22, 1953

Hon. K. J. Griffith

Judge of Probate

Cullman County

Cullman, Alabama

Juvenile Court—Public Welfare Department—Officers.

1. The power to appoint a juvenile court probation officer is vested solely in the juvenile court, together with the power of removal.

2. The Legislature has conferred upon the State Department of Public Welfare the authority to determine who are qualified to serve as probation officers.

3. Under the provisions of Title 13, Section 360, Code of Alabama 1940, the county governing body, public welfare board, and juvenile court judge must agree on a salary for the juvenile court probation officer. Any one of the three agencies or entities may defeat the determination or fixation of the salary of the probation officer.

Opinion by Assistant Attorney General Lee.

Dear Sir:

Your request for an official opinion, bearing date of August 7, 1953, is

as follows:

"I am judge of Probate and ex-officio juvenile Judge of this County. Title 13, Section 360, gives me the right to appoint a Probation Officer for the juvenile court. You will note it says, 'it can be either man or woman of good moral character, intelligent and sympathetic to the purpose of juvenile law,' but it also says that I am to pick from the candidates who have been certified from the State Department of Public Welfare. It also goes on to say that the State Department of Public Welfare shall prescribe reasonable standards of education, training and experience for any applicant for the position.

"1. Who would be the final authority as to what would be reasonable as to the qualifications of the candidate?

"2. Should the candidates make application to me or the State Department of Public Welfare?

"3. Could I, as appointing authority, say whether the rules and regulations as promulgated by the State Department as to qualifications be reasonable?

"4. What action would it take on my part as Judge, to have the State Department of Public Welfare to certify to me the name or names of the candidate or candidates that I must choose from?

"5. Could I, as appointing authority, require names of only men applicants?

"6. If I request the name of men applicants and the State Department was unable to furnish me with the names of any men applicants, what would be my action then?

"7. Could I, as Judge, appoint a probation officer whom I think has sufficient qualifications as to education, intelligence and moral character and a sympathetic attitude toward the purpose of the juvenile laws and inform the State Department of Public Welfare of my actions and be able to assure a salary to him from the County Governing body, if in the event the County Governing body and the Public Welfare Board of this county, and I as Judge agreed on the salary?

"(a) In the event we could not agree on a salary, what would be my recourse?

"8. In the event a probation officer were appointed and later on in my judgment he was not qualified, or was not doing the job sufficiently, could I discharge him?"

Rather than answer your inquiries seriatum, it is deemed expedient to discuss the situation generally to the end that you be given the information you desire.

Title 13, Section 360, Code of Alabama 1940, provides, in pertinent part, as follows:

> "The juvenile court may appoint probation officers, who may be either men or women, of good moral character, intelligent and sympathetic with the aims and purposes of this chapter, from the candidates who have been certified by the state department of public welfare. The state department of public welfare shall prescribe reasonable standards of education, training and experience which must be attained by any applicant for the position of probation officer in any of the several juvenile courts of the state. The number of probation officers necessary for any juvenile court shall be determined by the judge and the advisory board or the county board of public welfare where established. The court of county commissioners, board of revenue, or other governing body of the county, shall pay such probation officers so appointed a reasonable salary to be determined by the judge, the advisory board, or county board of public welfare and the court of county commissioners, board of revenue, or other governing body of the county, acting jointly, but no paid probation officer shall be employed unless such probation officer shall have been certificated by the state department of public welfare. . . . . Probation officers shall serve during the pleasure of the court and shall be removable by said court at any time. . . ."

In Section 6 of Act No. 703, General and Local Acts 1951, page 1211, there is contained the following:

> "Section 6. DUTIES, POWERS, AND RESPONSIBILITIES OF DEPARTMENT. . . . In order to unify and standardize probation work in the juvenile courts of this state, the state board of public welfare is hereby empowered to prescribe reasonable standards of education, training and experience which must be attained by any applicant for the position of probation officer in any of the several juvenile courts of the state before he shall be employed."

It is apparent that under Section 360, supra, the power of appointment of the probation officer is vested solely in the juvenile court. Aside from the expressed statutory provision regarding removal, the power of appointment carries with it the power of removal in the absence of constitutional or statutory restraint. **Jefferson County v. O'Gara**, 29 Ala. App. 281, 195 So. 267.

The Legislature has conferred upon the State Department of Public Welfare the authority to determine who are qualified to serve as probation officers. **White v. Powell**, 246 Ala. 356, 20 So. 2d 467. The provisions of the above-quoted statutory law should be followed and cannot be abrogated by the juvenile court. The matter of the basic qualifications of probation officers is of no concern to the judge of the juvenile court, and he has no authority or discretion in regard thereto.

Neither Act No. 703, supra, nor Section 360, supra, requires or authorizes the State Department of Public Welfare to prepare a roster of names of candidates for the position of juvenile probation officer. As a matter of administrative procedure, the State Department of Public Welfare, upon request from the juvenile court judge will furnish him with the job specifications, including minimum qualifications for juvenile court probation officers, together with application forms for the position. The Welfare Department will receive the applications from the judge and will measure the qualifications in accordance with the job specifications for the position of probation officer. Then it will certify to the juvenile court judge all the names of applicants, who meet the minimum qualifications. As appointing authority, the judge may appoint either a man or a woman.

With respect to fixing a salary for the probation officer, it is clear that the county governing body, the county welfare board and the juvenile court judge must "jointly" fix the salary.

In **White v. Powell**, supra, the court, in its interpretation of the pertinent provisions in Section 360, supra, writes:

> ". . . . the statute for this limited purpose creates three units, consisting of the judge, the county board of public welfare, and the board of revenue, each unit having one vote, and leaves to each of said boards to determine according to its own rules what vote it will cast."

In the event the county governing body, the public welfare board of your county, and you, as judge, could not agree on a salary, there is no recourse. Anyone of the agencies or entities may defeat the determination or fixation of the salary of the probation officer. See Quarterly Report of Attorney General, Vol. 39, page 10.

Very truly yours,

SI GARRETT,

Attorney General

September 22, 1953

Hon. C. G. Allen, Chairman
Gadsden Civil Service Board
Etowah County
902 Windsor Street
East Gadsden, Alabama

Municipalities—Etowah County—Merit System—Police.

1. A municipality operating under the general statutes has authority to create the office of chief of police and a police department and to appoint such police officers as are necessary to preserve order.

2. The City of Gadsden, having a civil service system for its police department, is not authorized to appoint special policemen not on the city payroll for particular private companies.

3. The civil service system for policemen in the City of Gadsden, provided for in Act No. 671, General and Local Acts 1951, page 1158, does not authorize the appointment of special company policemen.

4. Temporary appointments provided for in Section 10 of Act No. 671, supra, do not authorize the appointment of such company policemen.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of June 29, 1953, is as follows:

"As Chairman of the Gadsden Civil Service Board I will appreciate your opinion as to whether the Civil Service Board may, upon being requested to do so by the City Commission of Gadsden, designate as special police officers with full police authority, guards or other employees of private companies who are not on the city payroll, are not subject to the Civil Service Laws, and over whom neither the Civil Service Board nor the City Commission has authority.

"In connection with this inquiry I direct your attention to Title 62, Section 400, Code of Alabama of 1940 which appears to be the only statute touching on this question."

In my opinion your inquiry must be answered in the negative. The

Civil Service Board of the City of Gadsden is not, in my opinion, authorized to designate special police officers or guards as described in your inquiry.

The City of Gadsden, having a population of 55,725 by the 1950 Census, has a commission form of government as provided for in Act No. 112, General and Local Acts 1951, page 337. Section 3 of this act provides as follows:

> "Section 3. Each officer and employee of each such city shall be selected and employed by the said Board of Commissioners, shall be under its direction, and receive such salaries, wages or compensation as may be fixed by said Board of Commissioners. The Board of Commissioners shall prescribe and may at any time change the powers, duties and titles of all such officers and employees of said city, all of whom shall hold office and be removed at the pleasure of the Board of Commissioners. The authority herein given is subject to the provisions of any Civil Service or merit system law applicable to said city."

The Civil Service System governing the Police and Fire Departments of the City of Gadsden is provided for by Act No. 671, General and Local Acts 1951, page 1158.

Normally the offices of chief of police and the police departments are created by city ordinance. See Title 37, Section 407, Code of Alabama 1940. Police officers of an incorporated municipality, when properly appointed, have the powers of peace officers in their jurisdiction. **Boswell v. State,** 31 Ala. App. 518, 19 So. 2d 94; **Beasley v. McCorkle,** 237 Ala. 4, 184 So. 904.

A city operating under the general statutes contained in Title 37, Code of Alabama 1940, could, in my opinion, properly enact an ordinance not only establishing the office of chief of police and the police department, but by said ordinance could further authorize the chief of police to appoint special policemen to serve as guards for private companies. The salaries of such guards could, in my opinion, be paid by private companies, but the officers would be appointed and commissioned by the city and chief of police. Of course, the city council could do this in the exercise of its general police powers, and if the appointment of such special policemen for particular companies were necessary in order to preserve order.

I find, however, that this may not be accomplished in the City of Gadsden. It appears from the provisions of Act No. 671, supra, establishing a city civil service system for the police and fire departments, that persons who seek emloyment as policemen must file application with the civil service board (Section 7, Act No. 671, supra), must be appointed by the chief of police (Section 6, Act No. 671, supra), and their names must appear upon an eligible list prepared by the civil service board (Section 9, Act No. 671, supra). It further appears that such policemen or officers may be removed only for cause (Section 12, Act No. 671, supra), and are prohibited from participating in certain political activities (Section 17, Act No.

671, supra). Sections 11 and 25 of Act No. 671, supra, make it a crime for any person to issue or lend a police badge to any person other than a regularly employed police officer.

From the foregoing provisions of the Gadsden Civil Service law, it is my view that the Legislature intended to restrict the appointment of police officers in the City of Gadsden to those who are regularly employed by the city and who are subject to all of the provisions of the civil service law. If it were held that the chief of police had authority to appoint special police officers as described in your inquiry, it is clear that, being paid by the particular company, such officers would not have the tenure of office prescribed by the civil service law, supra. See, Section 2, Act No. 671, supra. They could be removed without cause by the company. Being hired by the company, they could not be required to make application or take examinations prepared by the civil service board, and consequently, their names could not appear on an eligible list. Their employment could not be terminated by the civil service board for participating in political activities, and the person delivering a badge to such special police officers would violate the provisions of Sections 11 and 25, Act No. 671, supra.

It results, therefore, that in the City of Gadsden such appointments are unauthorized.

You have referred to Title 62, Section 400, Code of Alabama 1940. The subject matter of this section now appears as Section 10 of Act No. 671, supra. In my opinion, this section, allowing the civil service board to authorize the temporary appointment of special officers, was designed for meeting conditions of a temporary nature and was not designed to allow the appointment of special police officers to act as described in your inquiry.

The Legislature has authority to provide for the appointment of special policemen as described in your inquiry (see Title 48, Section 214, et seq., Code of Alabama 1940), but it has not done so, so far as the City of Gadsden is concerned.

Very truly yours,

SI GARRETT,

Attorney General

September 25, 1953

Hon. W. G. Pruett, Director,
State Highway Department,
CAPITOL.

Highways and Highway Department—Motor Vehicles.

The Highway Director of the State Highway Department has authority to adopt and enforce standard specifications as to the entire lamp or lamps to be used on motor vehicles using the highways of this State.

Opinion by Assistant Attorney General Madison.

Dear Sir:

Your request for an official opinion bearing date of September 14, 1953, is as follows:

"Under Title 36, Section 44, Test and Approval of Lamps. The State Highway Department has for years required the approval of the entire lamp in carrying out the meaning of this section of the Code. The provision of this section mentions lenses and refers to candle power of bulb used in the lamp.

"Under the section referred to, the State Highway Director has adopted the specifications of the Society of Automotive Engineers as specifications for the State Highway Department of Alabama. The specifications of this association is used by all automotive manufacturers and is considered top authority on lighting device.

"The Highway Department of Alabama has required that the complete lamp be approved by a reputable testing Laboratory to see if this lamp meets all the requirements of the specifications, and I will thank you for your opinion as to whether or not we have authority to do this."

It is true that Sections 44 and 45 of Title 36, Code of Alabama 1940, deal more specifically with the approval of lens and the candle power of bulbs to be used therein in lamps for motor vehicles used on the highways of this State. However, subsection (b) of Section 44, supra, provides as follows:

"(b) The highway director is hereby authorized and required to adopt and enforce standard specifications as to the amount, color and direction of lights to be emitted by rear lamps, auxiliary driving lamps, head lamps and signal lamps for compliance with the requirements and limitations set forth in sections 40-42 of this title, and the highway director is authorized and required to determine whether the lens of any head

lamps, auxiliary driving lamps, signal lamps and read lamps submitted will comply with the requirements of this chapter and specifications adopted by the highway director and to approve such lens."

Title 36, Sections 40-42, Code of Alabama 1940, as amended by Act No. 417, General and Local Acts 1949, page 754, refers to many different kinds of motor vehicles, and there are many different kinds of lights that are required or permitted to be thereon, and the conditions of lighting pertaining thereto are numerous.

It is my opinion that, in order for the Highway Director to properly see that the requirements and limitations set forth in Sections 40-42, as amended, supra, are complied with with reference to the amount, color, and direction of lights to be emitted by the required or permitted lights on motor vehicles, he must have the authority to approve the specifications for the entire lamp. In my opinion, subsection (b) of Section 44, supra, gives him this authority.

I do not believe that he could enforce compliance with the requirements and limitations set forth in Sections 40-42, as amended, supra, by the approval only of the lens and the candle power of the bulbs to be used therein.

Yours very truly,

SI GARRETT,

Attorney General

September 25, 1953.

Hon. Hollis C. Smith,

Chairman, Board of Revenue,

Lauderdale County,

Florence, Alabama.

Counties—Lauderdale County—Taxation—Highways and Highway Department.

1. Where a county governing body pledges the proceeds of the two and one-half mill tax levied under authority of Section 215 of the Constitution of Alabama 1901 as security for the payment of the interest and principal on warrants issued for road and bridge purposes, and contracts and agrees with the warrant holders to levy the tax annually, it cannot thereafter divert the tax for public building purposes only, so long as the warrants and the interest thereon remain unpaid.

2. Where the resolution of a county governing body, pledging the proceeds of the two and one-half mill tax levied under authority of Section 215 of the Constitution of Alabama 1901 to the payment of the interest and principal on warrants issued for road and bridge purposes only, requires that out of the annual levy the interest and principal on the warrants due that year shall be paid, the excess or surplus remaining after said payment may be used for public building purposes.

3. Under authority of Local Act No. 30, Acts of 1953, approved May 28, 1953 (Ms.), it is the duty of the governing body of Lauderdale County to pay to the State Highway Department annually enough of the proceeds of the two and one-half mill tax levied under authority of Section 215 of the Constitution of Alabama 1901 to retire the interest and principal on road and bridge warrants coming due that year.

Opinion by Assistant Attorney General Madison.

Dear Sir:

Your request for an official opinion bearing date of September 5, 1953, is as follows:

"The Road Department of Lauderdale County, Alabama, was changed by Act No. 30 (Local Law Regular Session, 1953). Section 4 of said Act No. 30 is as follows:

"'. . . After the effective date of this Act, the State Highway Department shall pay, before delinquency, all of the outstanding financial obligations of Lauderdale County which were incurred prior to the adoption of this Act or hereafter incurred for the construction, maintenance or repair of county roads and bridges, out of the funds to be paid over to the Highway Department as set out above. All of such funds shall be maintained separately by the State Highway Department and shall be used by it solely; first, for the payment of debts of Lauderdale County incurred for road and bridge purposes as set out above and second, for the purpose of construction, maintenance and repair of the county's roads and bridges. . . .'

"The Commissioners Court of Lauderdale County, Alabama, in 1939, passed a resolution containing fourteen (14) pages. We are primarily concerned with Section 6 and Section 12 of this resolution.

"Section 6. '. . . (1) There is hereby established a special fund to be known as the "Series A Warrant Fund" of the county for the purpose of providing for payment of the principal of and interest on the new warrants of Series A as said principal and interest shall respectively mature. The county hereby agrees to pay and hereby orders paid into said

Series A Warrant Fund all proceeds of the special tax of one-fourth of one percentum (¼ of 1%) on the assessed value of the taxable property in the county authorized to be levied and collected annually by the county under the provisions of Section 215 of the Constitution of Alabama for the payment of any debt or liability created for the erection of public buildings, bridges or roads in the county (which tax is hereinafter referred to as "said special tax") as the proceeds of said special tax shall be received by the county and to such extent as may be necessary to pay the principal of and interest on the new warrants of Series A as and when the said principal and interest shall respectively mature. Such pledge of the proceeds of said special tax shall be subordinate to the pledge thereof hereinafter made for the benefit of the new warrants of Series C but shall be superior to the pledge thereof hereinafter made for the benefit of the new warrants of Series B. . . .'

"Section 12. 'The provisions of this resolution and order shall constitute a contract between the county and each holder of the new warrants and the interest coupons issued hereunder. Whenever all of the new warrants and the interest coupons and the interest thereon shall have been paid in full and all the agreements on the part of the county herein contained with respect thereto shall have been performed, then the obligations of the county hereunder shall thereupon cease.'

"On February 1, 1953, prior to the creation of the Board of Revenue of Lauderdale County, Alabama, the Commissioners Court of Lauderdale County, Alabama, made a levy of a special tax of one-fourth of one percentum (¼ of 1%) on the assessed value of the taxable property in the county under Section 215 of the Constitution of Alabama for the purpose of public buildings.

"There is the sum of $20,000.00 due July 1, 1953, together with $2,145.00 interest on refunding road and bridge warrants and are the warrants referred to in Section 6 of the resolution of the Commissioners Court of Lauderdale County, Alabama, in 1939.

"Lauderdale County, Alabama, has an outstanding obligation of $25,000.00 per year for building an addition on the Local Hospital. Lauderdale County, Alabama, has a further obligation to build a Health Center.

"There has been some discussion between Lauderdale County, Alabama, and the Highway Department in Montgomery, Alabama, in regard to the tax collected under Section 215 of the Constitution. The following letter was received from the Director of the Highway Department:

" 'August 27, 1953

Hon. Hollis C. Smith, Chairman,
Board of Revenue,
Lauderdale County,
Florence, Alabama.

Dear Sir:

" 'Confirming my conversation with Hon. Henry Romine, regarding accumulation of moneys from the 2½c mill tax being held by you, which moneys are to service debt service requirements on the Series A refunding warrants with The First National Bank of Florence due July 1, 1953, we wish to advise that if the Court of County Commissioners will forward to this department the amount of $22,145.00, which amount includes the principal payment of $20,000.00, plus $2,145.00 interest, it will enable us to make the necessary liquidation.

" 'It will be immaterial with this department whether or not the County retains the balance in the fund as it is accumulated so long as sufficient moneys are forwarded to this department to pay maturities as they become due.

Yours very truly,
/s/ W. G. Pruett,
Director.'

"It is the intention of the Board of Revenue of Lauderdale County, Alabama, to accept the proposal of the Highway Department to pay the amount of the Series A refunding Warrants to the First National Bank as the same becomes due.

"We would like your official opinion upon the following questions:

"1. Whether or not this money can be paid to the Highway Department after the levy has been made designating this money for Public Buildings?

"(a) Whether or not in the face of Section 6 of the resolution of 1939 the levy of all of this tax for public buildings is void or avoidable?

"(b) Whether or not a new resolution or levy will be necessary before any part of this money can be used for public buildings?

"2. Whether or not this money retained by the County after making the payment of $22,145.00 to the Highway Department or a like payment each year can be used to meet the obligations of Lauderdale County, Alabama, in paying its obligation on the Local Hospital?

"3. Whether or not the accumulation of this money after the Series A Refunding Money have been paid each year can be used to construct a Health Center under Hill-Burton Act?

"4. Whether or not any part of the remainder of this money after the payment to the Highway Department each year of the amount due on the Series A Refunding Warrants may be used for building any public buildings?

"(a) Maintenance of Public Buildings?

"(b) Repairing Public Buildings.

"Since the amount was due under Series A Warrants on July 1, it is imperative that we have the information asked for above as soon as possible, and the writer would be especially grateful to you for an immediate opinion on this matter."

In 1939 the governing body of Lauderdale County pledged the two and one-half mill tax authorized to be levied under Section 215 of the Constitution of Alabama 1901 to the payment of the principal and interest on warrants issued, as appears from your request, for road and bridge purposes only.

The resolution pledging the tax to the payment of said warrants created a special fund, and the county governing body required and ordered all of the proceeds from said special tax of two and one-half mills to be paid annually into said fund "as the proceeds of said special tax shall be received by the county and to such extent as may be necessary to pay the principal of and interest on the new warrants of Series A as and when the interest and principal shall respectively mature."

While the intent of this resolution is not too clear from its wording, it is my opinion it means that the governing body should annually levy the tax and out of the proceeds thereof pay the installments of principal and interest maturing during the year for which the tax was levied.

If there is an excess over and above the amount necessary for the annual installment payments, then the excess can be used for other purposes authorized by said Section 215 of the Constitution. In other words, I do not think that the resolution pledged the entire proceeds of this special tax each year to the payment of all the interest for all of the years and all of the principal of the warrants in question.

Somewhat similar provisions were so construed in opinions of this office reported in Quarterly Report of Attorney General, Vol. 28, page 150; Vol. 49, page 104.

After providing for the levying of this tax to secure the payment of the principal and interest on said warrants, the county governing body provided in Section 12 of the resolution, "The provisions of this resolution and order shall constitute a contract between the county and each holder of the new warrants and the interest coupons issued hereunder. Whenever all of the new warrants and the interest coupons and the interest thereon shall have been paid in full and all the agreements on the part of the county herein contained with respect thereto shall have been performed, then the obligation of the county hereunder shall thereupon cease."

This clearly places upon each governing body of Lauderdale County the obligation and duty to levy annually said tax until the principal and interest on the warrants are paid in full. So long as the warrants remain outstanding and unpaid, the county governing body cannot divert the said tax fund from the purpose for which it is pledged to an entirely different one.

In my opinion, the case of **Board of Revenue v. Farson, Son and Company**, 197, Ala. 375, 72 So. 613, is in point and the following statement therefrom is here applicable:

> "After a number of years there was a change in the governing body of the county, from a court of commissioners to the present board of revenue, and consequently a change in the personnel of the officers. The board of revenue, it seems, concluded to levy this special tax for other and different purposes than those for which it was formerly pledged, and have contracted or propose to contract, a large indebtedness for the building of new bridges and the improvement of public roads, to be paid for out of this special tax, and have issued interest-bearing warrants for such purposes. In short, the effect of their action is to repudiate the agreement of the court of county commissioners that this special tax fund should be exclusively devoted to the payment of the courthouse debt for which it was pledged, and to divert the fund from that purpose to an entirely different one. It is insisted that this cannot be done, upon the theory that it would take away the power to enforce the contract, and therefore, by subsequent legislation, as it were, impair the obligation of the contract, contrary to the provisions of the federal and state Constitutions. We are of the opinion that this insistence is well supported by the authorities."

You have given me information since your request which informs me that the money on hand from the special tax levied under authority of said

Section 215 of the Constitution, which became due October 1, 1952, arises from a levy made for roads, bridges and public buildings. You should, in my opinion, pay to the State Highway Department out of this money the amount necessary to pay the principal and interest on the warrants due July 1, 1953. You can then, if you so desire, designate the balance for the public building purposes mentioned in your letter, including the maintenance and repair of same. **Hall v. Underwood**, _____ Ala. _____, 63 So. 2d 683; **Southern Railway Company v. Cherokee County**, 144 Ala. 579, 42 So. 66; **Southern Railway Company v. Jackson County**, 189 Ala. 436, 66 So. 570; Title 12, Section 186, Code of Alabama 1940.

The special tax levied February 1, 1953, is for public buildings only. If this levy is valid, the proceeds cannot be used for any other purpose than for public buildings. It cannot be used to pay the principal and interest on the warrants, which were issued for road and bridge purposes only. None of this money can be paid to the Highway Department, as it has nothing to do with the handling of funds for public buildings. Its concern is with roads and bridges and the obligations of Lauderdale County pertaining thereto.

I have indicated herein, however, that, in my opinion, the levy of February 1, 1953, is not valid in view of the prior pledge of the proceeds of the tax to the payment of the said warrants issued or road and bridge purposes only.

It is my suggestion to you, therefore, that the county governing body revoke the levy of February 1, 1953, and make another levy before October 1, 1953, for roads, bridges, and public buildings; that you then designate to be paid out of the proceeds of this levy to the State Highway Department enough each year to pay the principal and interest on the warrants until they are paid in full. If you so desire, you can then designate the use of the excess to your public building needs.

There is nothing contained in your Local Act No. 30, passed at the 1953 Regular Session of the Legislature, which, in my opinion, does or could relieve the county governing body of its legal obligation and duty to levy the tax for the payment of the interest and principal on said warrants.

It is deemed expedient, for your better information, to answer your questions in this manner, rather than to take them up one by one.

Yours very truly,

SI GARRETT,

Attorney General

September 29, 1953

Hon. Q. P. Flournoy, Mayor
City of Chickasaw
Mobile County
Chickasaw, Alabama

Census—Officers—Municipalities—Salaries.

1. The municipal census provided for in Title 37, Sections 481-484, Code of Alabama 1940, is such a census as may be used to determine the population of a municipality for the purpose of establishing the proper salary bracket of the mayor thereof under the provisions of Title 37, Section 440, Code of Alabama 1940, as amended by Act No. 315, General Acts 1945, page 506.

2. The prohibition on salary changes for a mayor of a municipality as set out in Constitution of Alabama 1901, Sections 68 and 281, and Title 37, Section 411, Code of Alabama 1940, applies only to any law or ordinance affecting the mayor's salary during the term of office in which the law or ordinance affecting said salary becomes effective.

3. The provisions of Title 37, Section 440, Code of Alabama 1940, as amended by Act No. 315, General Acts 1945, page 506, are operative to cause a change in salary of a mayor, within the terms of the section itself, at the beginning of or during any term of office of a mayor subsequent to the term of office which encompassed the date July 7, 1945.

Opinion by Assistant Attorney General Galloway.

Dear Sir:

Your request for an official opinion, bearing date of August 31, 1953, is as follows:

"I shall appreciate it if you will advise me whether or not the prohibition against increasing the salary of elected officers in a municipality, as set out in Section 411 of Title 37 of the 1940 Code of Alabama, will prevail over the minimum salaries as defined in Section 440 of this title, where a municipal census reveals that the mayor is receiving a salary of less than the statutory minimum."

Title 37, Section 440, Code of Alabama 1940, as amended by Act No. 315, General Acts 1945, page 506, provides in pertinent part as follows:

"Section 1. . . . The mayor shall have the powers and perform the

duties as follows: He shall keep an office in the city or town, and shall receive such salary as the council may prescribe, not exceeding the following amounts (1) In cities having twenty-five thousand population or more, not exceeding six thousand dollars, and not less than twenty-seven hundred dollars a year; (2) in cities having ten thousand and up to twenty-five thousand population, not exceeding forty-five hundred dollars and not less than twenty-four hundred dollars a year; (3) in cities having five thousand up to ten thousand population, not exceeding three thousand dollars, and (not) less than one thousand dollars a year; (4) in cities having less than five thousand population, not exceeding twenty-four hundred dollars, and not less than six hundred dollars a year; (5) in towns, not exceeding twelve hundred dollars and not less than one (hundred) and twenty dollars a year. . . ."

It is to be noted from the pertinent part of Section 440, as amended, supra, quoted above, that the population requirement governing the salary of a mayor is not dependent upon a court by any particular type of census. If, in fact, the population of a municipality is a certain number, then under said section the mayor of such municipality should receive a salary within the salary bracket for such population.

A determination of this fact of population could be made for the purpose of establishing the salary bracket of the mayor of a municipality by complying with the provisions of Title 37, Sections 481-484, Code of Alabama 1940. For a similar holding, see **Taxpayers and Citizens of City of Fort Payne v. City of Fort Payne**, 252 Ala. 231, 40 So. 2d 439.

It is, therefore, assumed that the municipal census referred to in your inquiry was a census made under the provisions of, and conforming to, Sections 481-484, supra.

The provisions of Section 440, as amended, supra, make no requirement that, when a certain population is attained, any increase or decrease in the mayor's salary that may result from such change in population be deferred until the end of the term of office of the encumbent. In the absence of some superior law in conflict with the provisions of Section 440, as amended, supra, the salary of a mayor should be in accordance with the salary provisions of such section, and any increase or decrease in salary should take effect at the time the determining population reaches a point so as to cause a change in salary.

In your inquiry you refer to a law which is in possible conflict with the provisions of Section 440, as amended, supra. Such law found in Title 37, Section 411, Code of Alabama 1940, provides as follows:

"§ 411. Salary, fees, compensation, etc., not increased or diminished.—The fees, salary, compensation, or emoluments of any officer whose election or appointment is required or authorized by this title shall not be increased nor diminished during the term for which he shall have

been elected or appointed, and no gratuitous appropriation in any case shall be made to or for the benefit of any officer or employe in addition to salary."

Section 411, supra, was passed pursuant to certain compensation restrictions here pertinent, as set out in Sections 68 and 281, Constitution of Alabama 1901.

I am familiar with no Alabama Appellate Court decision which deals with the matter of whether Sections 68 and 281, supra, prohibit a salary change in accordance with the provisions of Section 440, as amended, supra, during a mayor's term of office.

A previous opinion of this office found in Biennial Report of Attorney General, 1920-22, page 264, in answering a question similar to the one presented, states the following:

"Section 281 of the Constitution has no application to officers who take office after the approval of the Act which fixes their salaries. In other words Section 281 would prevent the legislature from changing the salary of the officer during the term of office.

"When your county solicitor was appointed, however, he took that office with the knowledge that if the census increased or diminished, his salary would likewise be increased or diminished. Section 281 does not prevent the law which was passed and approved prior to the beginning of his term of office from having full force and effect according to its terms."

While there is conflict in the cases of other states construing the same or similar constitutional limitations as we have in Alabama, the weight of authority is that a statute effective before the beginning of the term of a public officer, whereby his compensation is automatically increased or diminished during his term by reason of increase or decrease of the population as shown by a later census, is not in conflict with a constitutional inhibition to the effect that the compensation of such officer shall not be increased or decreased during his term of office.

In the case of **State ex rel. Harvey v. Lineville**, 318 No. 698, 300 S. W. 1066, the court, in considering a staute similar to Section 440, as amended, supra, in light of Section 8 of Article XIV of the Constitution of Missouri, which inhibits an increase of salaries of officers during their terms, stated the following:

"The increase of salary which a statute permits after an election showing an increase of population is not in violation of the Constitution in that the salary is increased during the term for which the officer was elected, because the law in force at the time of his election fixes his salary, to be ascertained at periods as changed by the increase in population."

In **State ex rel. Mack v. Guckenbeiger**, 139 Ohio St. 273, 39 N. E. 2d 840, the following is found:

> "The inhibition found in Section 14, Article IV of the Constitution, to the effect that the compensation of common pleas judges 'as may be provided by law,' that is, by the Legislature, 'shall not be diminished, or increased, during their term of office,' is directed to the Legislature and not to the officer who pays the compensation or to the judge who receives it. The inhibition, according to the language of the Constitution thus directed to the Legislature, is that it shall not by legislative act during his term diminish or increase the compensation of any common pleas judge. Such compensation must be fixed before his term begins, but there is no inhibition against the Legislature fixing such compensation before the term begins on a basis which may vary it in amount as time advances, provided that basis, within the contemplation and understanding of both the judge and the people who elect him, is fixed, certain and unchangeable during his term. Such action upon the part of the Legislature does not thereby sanction or attempt to legalize an evil or vice which the Constitution prohibits."

It was held in **County of Yuma v. Sturges**, 15 Ariz. 538, 140 P. 504, that a constitutional provision that compensation of any public officer should not be increased or diminished during his term of office did not operate to prevent a county treasurer from receiving an increase in salary during his term of office. In this case the state board of equalization had increased the assessed valuation to the amount specified for such increased salary. Since the fluctuation was not occasioned by any subsequent legislative action but by operation of the law in force and effect and controlling the compensation of the office at the beginning of the term of office, the increase was effected by the operation of that law automatically. The court said:

> " . . . Under the classification in force when appellee went into office, Yuma County was a county of the first class, with an assessed valuation less than $9,000,000; his compensation was, therefore, fixed at $2,200 per annum. In August, 1913, Yuma county, while still remaining a county of the first class, nevertheless its equalized assessed valuation became more than $9,000,000, and appellee's compensation was therefore fixed at $2,500 per annum. Not by virtue of any subsequent legislative action, but solely by the automatic operation of the very law in effect at the beginning of the term, and which law definitely prescribed and fixed the compensation incident to the office, the amount thereof being graded according to the determination of an extraneous fact, to wit, the fact of the equalized assessed valuation."

For like or similar holdings, see **Puterbaugh v. Wadham**, 152 Col. 611, 123 P. 804; **Bass v. Board of Commissioners of Lincoln County**, 97 Okla. 94, 222 P. 995; **St. Joseph County v. Crow**, 214 Ind. 437, 15 N. E. 2d 1016; **State ex rel. Jaumotte v. Zimmerman**, 105 Mont. 464, 73 P. 2d 548.

Although I am constrained to hold with the majority, at least one state has decided the matter of instant concern contra to those above cited. See **Guldin v. Schuylkill County,** 149 Pa. 210, 24 A. 171.

The prohibition on salary changes set out in Sections 68 and 281, supra, and also Section 411, supra, does, in accordance with the weight of authority, apply only to laws or ordinances becoming effective during the term of office in which the law or ordinance affecting the change is made law, and does not apply in an instance where the law or ordinance is already in effect, and its automatic provisions become operative during a torm subsequent to that in which it became effective.

Act No. 315, amending Section 440, supra, became effective on July 7, 1945.

It is, therefore, my opinion that since the prohibition on any law or ordinance changing salaries applies only as above set out, then the provisions of Section 440, as amended, supra, would be operative to cause a change in salary at the beginning of, or during, any term of office subsequent to the term in which Act No. 315, amending Section 440, supra, became effective.

Yours very truly,

SI GARRETT

Attorney General

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